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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD R. MUSE, *et al.*,
Individually and on behalf of Others Similarly Situated,
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employer/ERISA fiduciary have the affirmative duty to disclose truthful information about the serious consideration which it is giving to an enhanced severance plan?

2. Can serious consideration of an enhanced severance plan, to which the ERISA fiduciary duty to avoid material misrepresentations attaches, arise before the date on which an employer/fiduciary decides that a particular plan will be offered for a particular business purpose?

PARTIES TO THE PROCEEDING

The Petitioners are Richard R. Muse, Billie M. Marking, William C. Thorn, Thomas J. McDermott, Benjamin G. Pastrick, Thomas K. Leonard, J. Scott Hackney and Linden L. Elder, individually and as Representatives of the certified Class, being:

> All former employees of International Business Machines Corporation (IBM) who were employed by IBM at its Lexington, Kentucky site and whose employment was terminated under IBM's Voluntary Transition Payment Program, which was offered on September 28, 1989 (VTP-1), IBM's Voluntary Transition Payment Program which was offered on December 5, 1989 (VTP-2) or IBM's Voluntary Transition Payment Program/Five-Year Pre-Retirement Leave of Absence Program which was offered on January 22, 1990 (VTP/LOA), and who would have been eligible, had they not previously retired, to participate in IBM's Lexington Transition Payment Program (LTPP) which was offered on August 1, 1990.

Said Class was divided into three subclasses: (1) all members of the Class whose employment was terminated based upon their participation in VTP-1; (2) all members of the Class whose employment was terminated based upon their participation in VTP-2; and (3) all members of the Class whose employment was terminated upon their participation in VTP/LOA. The Sixth Circuit added Patsy S. Adams as a party plaintiff, and she is named as an additional Petitioner herein.

The Respondents are International Business Machines Corporation and International Business Machines Corporation as Plan Administrator of the VTP-1, VTP-2, VTP/LOA and LTPP Incentive Plans.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Richard R. Muse, et al., individually and on behalf of others similarly situated, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in this case [Appendix at 1a] is reported at 103 F.3d 490 (6th Cir. 1996). The opinion of the United States District Court for the Eastern District of Kentucky [Appendix at 10a] is not reported. The proposed findings of

fact and recommendations of the Magistrate Judge of said District Court [Appendix at 22a] is not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on December 26, 1996. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Involved herein are relevant provisions of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), appearing at 29 U.S.C. §§ 1104 and 1132(a). [Appendix at 37a].

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under ERISA, with specific reference to 29 U.S.C. §§ 1132(e)(1) and (f). The principle of pendant jurisdiction was asserted with respect to Petitioners' common law claims.

The gravamen of the complaint is that several hundred long-term IBM employees at IBM's Lexington, Kentucky facility were induced to resign, retire or take early leave under one of three variations of an incentive program ("VTP") at a time when IBM was seriously considering the offering and implementation of an enhanced incentive program for which these employees would have been eligible. It was alleged that these employees specifically asked whether a better plan would be made available and whether VTP was the best that would be offered. They consistently were told that no better plan would be offered and that VTP was as good as they would get. These employees retired in reliance upon these misrepresentations and in response to veiled threats by IBM of relocation or demotion if they did not participate in VTP. In addition, IBM never disclosed the serious consideration that it was giving to an enhanced plan during

the employees' VTP eligibility period(s). The subsequent enhanced plan (named LTPP) is the subject of this action.

A. Factual Background

As a means of addressing serious financial difficulties that were plaguing it in 1989, IBM retained outside consultants to assist in finding solutions. One such consultant in the summer of 1989 recommended that IBM dipose of its "non-core" Information Products ("IP") business located at Lexington at a time when more than 4400 of that site's 5400 employees were in the IP sector. High level IBM management considered this recommendation and immediately initiated steps toward implementation. As early as March 1989, IBM was considering the sale, downsizing, or closure of its Lexington facility, and had recognized the need to reduce the number of employees at the Lexington facility in either event. [Appendix at 15a]. IBM's primary goal was to reduce the number of employees at the Lexington facility [Appendix at 4a], so that the number of employees remaining would be approximately 3450.

In 1989, IBM set upon a course of action to resolve its Lexington workforce surplus through the use of severance programs. Such was necessary because of IBM's adherence to a "full employment policy," i.e., avoidance of layoffs or other involuntary employment actions aimed at downsizing. In conformity with that corporate philosophy and in furtherance of its primary goal, IBM offered the series of VTP programs (described under Parties To The Proceedings at p. ii, *supra*) collectively covering the period from September 28, 1989 through March 31, 1990. These programs offered one week of salary for each six months of service up to a maximum of fifty two weeks, commonly known as a 1X program.

All tolled, and as expected by IBM, only 364 IBM Lexington employees participated in the VTP Plans. These employees repeatedly questioned their managers

concerning the offering of a plan better than VTP and whether VTP was the best plan that would be offered. These employees knew that enhanced plans had been offered in the past [Appendix at 2a-3a]. However, they were told that "no better plan is coming" and that "[VTP] was the best deal we would get." [Sixth Circuit Joint Appendix ("JA") at 567-611]. That this was the IBM sales pitch used at Lexington was confirmed by an IBM Memo sent months later, iterating that participants had been told that "VTP was as good as it's going to get," although IBM knew that such representation was not true. [Appendix at 39a]. IBM knew that the representation was false because VTP was never designed to achieve IBM's ultimate goal of the mandated reduced headcount level at Lexington.

By November, 1989, work on all three business options was well under way. A task force was created to study the process for closing the site. In connection with this work, William Colucci, the chief Personnel executive of IBM U.S., recommended a formula for Lexington employees of two times salary for each six months of service to a maximum of 104 weeks plus $25,000 ("2X + $25K"). Bill Bowles, head of the IP Business in the U.S., already had been studying a substantial downsizing alternative for Lexington. He directed his high-level managers to study the offering of a significant severance plan. They adopted the same severance plan, namely 2X + $25K.

However, by late November, 1989, IBM had eliminated closure as an alternative, put downsizing on the back burner and shifted its focus to the sale option through the creation of the Libra task force, headed by James Forese, IBM Vice President and Group Executive. IBM's Chairman and CEO, John Akers, acknowledged that *IBM knew that in order to sell the IP Business at Lexington, it had to reduce the site's workforce beforehand.* [JA at 764]. Few potential buyers would be looking for a com-

pany over staffed by as much as 1,000 employees. [JA at 647-48].

In this same time frame, IBM directed its Controller, Michael Van Vranken, to study whether IBM should accrue the anticipated corporate restructuring expenses in calendar 1989. As a part of that accrual work, Van Vranken conducted cost studies to determine the amount of money necessary to cover an appropriate enhanced incentive plan for the targeted Lexington headcount reduction and associated restructuring expenses. He, too, used the 2X + $25K formula in his studies and calculations and concluded that in order to cover the costs of such a plan IBM should accrue approximately $300 million for Lexington. This 2X + $25K was the same severance plan used by IBM in downsizing its Boca Raton and Tucson operations a year earlier, a plan about which the Lexington employees had knowledge when they asked whether any better plan was coming.

Based upon Mr. Van Vranken's recommendations, Mr. Akers finally told IBM's Board of Directors on November 28, 1989, that IBM would take an accrual against its 1989 earnings in anticipation of restructuring, *including the sale of the Lexington site* [JA at 406], one component of which was the $300 million needed to pay for the 2X + $25K incentive plan. On December 5, 1989, after first advising his senior managers and in keeping with Board approval, Mr. Akers publicly announced that IBM would take a total accrual of $2.3 billion against 1989 earnings for such corporate wide restructuring. [JA 408-09]. Although for business reasons, Mr. Akers did not publicly disclose the $300 million set aside for Lexington headcount reduction, Mr. Van Vranken confirmed that such accrual "Assumed Lexington Downsizing" [JA at 557] and that the $300 million needed for the 2X + $25K plan "was a provision for *expected* restructuring action." [JA at 1097]. (emphasis added).

By December 1, 1989, another of IBM's consulants had furnished IBM with a list of potential buyers, including Clayton & Dubilier, the eventual purchaser. On December 8, 1989, senior IBM officers met to further discuss some of the "likely selling problems" and again acknowledged that the Lexington business employed too many people and that "solutions were only partially implemented," a reference to the small number of people who were being persuaded to sign up for VTP-1. At this same time, a sale offering memorandum was being prepared by IBM investment consultants reflecting that IBM was "selling" a Lexington workforce of 3450, or approximately 1000 less IP employees than the site currently employed.

On January 24, 1990, Mr. Forese, as head of the Libra task force, presented the progress of the sale efforts to the IBM Management Committee. He advised them that since the accounting reserve (accrual) for Lexington already had been taken, IBM "must take action this year on [the] site." He further discussed the workforce reduction necessary to achieve the targeted headcount of 3450, using a chart that IBM had prepared when closure still was an option and which reflected the potential enhanced severance plans being considered, including 2X + $25K. The record confirms that various formulas were presented, discussed, studied and massaged by senior management for many months, starting as early as March, 1989; without exception, such formulas represented severance plans superior to the VTP plans.

In late February or early March, 1990, IBM officials had their first meeting with Clayton & Dubilier. In the last week of March, another meeting was held, and on April 19, 1990, Clayton & Dubilier met with IBM officials in Lexington regarding its ongoing interest in purchasing the facility. It was IBM who assured and confirmed to this ultimate purchaser that the employee headcount would be reduced in accordance with IBM's sale offering memorandum, mirroring Mr. Akers' testimony on this point.

Conspicuously absent from the record, however, is any evidence that "it was not until IBM . . . was told by the buyer that further downsizing was necessary that IBM focused (on this particular purpose, i.e., sale)." [Appendix at 7a]. Thereafter, IBM continued to prepare for the implementation of the enhanced plan that would be offered to the remaining employees, and on June 19, 1990, a task force recommended to the Management Committee that the 2X + $25K plan be offered, to be called the Lexington Transition Payment Program ("LTPP"). On July 12, 1990, the Management Committee approved the offering of LTPP, to be effective August 1, 1990.

B. Decision Of The District Court

The Magistrate Judge's Proposed Findings of Fact and Recommendations were adopted and incorporated into the district court opinion. In tandem, then, the district court found:

- As early as March, 1989, IBM was considering the sale, downsizing or closure of the Lexington site and had recognized the need to reduce the number of employees at Lexington under any scenario [Appendix at 15a];
- On September 28, 1989, IBM offered VTP-1 to the Lexington employees, knowing in advance of that date that such program would not sufficiently reduce headcount [*Id.*];
- Consequently, IBM continued to consider the sale, downsizing or closure of Lexington and continued to consider various means by which it could further reduce the number of employees at Lexington [*Id.* at 33a];
- At least by November, 1989, one of the incentive formulas suggested by high level IBM officials for reducing headcount at Lexington was two times separation pay plus $25,000; "that is, a program which would offer benefits similar to those ulti-

mately offered by LTPP." At that time, the suggestion was rejected. [*Id.* at 15a].

- IBM admitted ". . . it was seriously considering the closure, sale, or downsizing of the Lexington facility during the eligibility periods of [the VTP plans], and . . . it was *seriously considering* various programs to reduce the number of employees at the Lexington facility during the relevant periods." Nevertheless, IBM contended that it did not consider offering the *"LTPP" program* until June 19, 1990. [*Id.* at 12a];

- Notwithstanding the facts of record and the foregoing finding of the district court concerning serious consideration of various plans during the eligibility period(s), the court found that IBM did not give serious consideration to offering "LTPP" or any other financial assistance program, during the eligibility periods of the VTP plans. "Simply because a plan *similar to LTPP* was being developed prior to April 19, 1990 does not necessarily mean that IBM was seriously considering offering the plan to its employees at the Lexington facility." [*Id.* at 18a-19a].

- LTPP was a costly undertaking and that but for Clayton & Dubilier's interest in purchasing the Lexington facility, no reasonable trier of fact could conclude that IBM would have seriously considered such a costly undertaking as a means by which to reduce headcount at Lexington. [*Id.* at 35a].

Notwithstanding the foregoing, and the failure of the district court to make any reference to the November 28, 1989 action of IBM's Board, the district court held that serious consideration of *the specific plan*, being LTPP, did not occur until April 19, 1990, when Clayton & Dubilier visited the Lexington site.

C. Decision Of The Sixth Circuit.

On appeal, although the Sixth Circuit acknowledged the existence of the multiple studies and the 1989 accrual of $300 million for an enhanced plan for Lexington [Appendix at 6a], it apparently concluded that such was not sufficient evidence of serious consideration. Although the court acknowledged the allegations (for which there was substantive evidence, as set forth above) that the Lexington employees had inquired whether a better plan was coming and were told "no," it held that IBM did not knowingly deceive plaintiffs about the possibility of an enhanced plan. [*Id.* at 8a]. Although the court found that the June 14, 1990 Clark memo [*Id.* at 39a] represented the only suggestion of improper behavior by IBM, it apparently construed that document in a "targeted plan to deceive" context. However, the undisputed deposition testimony of plaintiffs [JA at 567-611] confirmed that when asked whether any better plan would be offered, they were told that "VTP was as good as it's going to get." Their inquiries were not limited to a 2X + $25K offer and the responses were identical in phrasing to the concerns expressed by Mr. Clark in his Memo to Mr. Colucci, head of IBM Personnel.

Citing to *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), the court observed that any misrepresentations made by IBM to plaintiffs after it gave serious consideration to the implementation of an enhanced incentive plan could constitute a breach of its ERISA fiduciary duty. [Appendix at 6a]. The court further held that *even if* plaintiffs proved serious consideration, they had the additional burden to prove breach of that fiduciary duty, measured in terms of intentional misrepresentation only ["a targeted plan to deceive the plaintiffs"]. [Appendix at 8a].

Citing to *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993), the court observed that once serious consideration exists,

it is well-settled that the employer has a fiduciary duty not to make misrepresentations to potential plan participants about the second offering. [Appendix at 5a]. Relying on *Drennan*, plaintiffs argued that IBM should have provided them with sufficient information to enable them to make an informed decision with respect to retirement under a VTP plan, i.e., IBM had an affirmative duty to disclose progress being made with respect to an enhanced plan. [*Id.* at 3a-4a]. This argument was rejected by the court. [*Id.* at 6a-7a].

The court redefined serious consideration by creating a bright-line, date intensive test that focused upon *serious consideration of the business decision*, i.e., the sale of the Lexington facility to the ultimate purchaser. [*Id.* at 7a]. The court held that serious consideration cannot occur "until a company focuses on *a particular plan* for *a particular purpose*." *Id.* (emphasis added). As applied to the instant case, the Sixth Circuit held that IBM's ultimate goal, i.e., the reduction of excess headcount at Lexington, which only could be accomplished through an enhanced plan, was irrelevant. Yet there never was a question whether IBM would offer an enhanced plan, it was only a matter of when it would be implemented (which implementation, according to the evidence, had to occur in 1990).

Under the Sixth Circuit's new test, serious consideration arises only when the employer has a concrete, defined plan in place, to the exclusion of all other variable or alternative enhanced plans, and implementation of that concrete ("particular") plan is inextricably tied to a specific, triggering business event ("particular purpose"). [*Id.* at 7a].

The most notable of the uncontroverted evidence and judicial findings in the record were: (i) the district court's acknowledgment that IBM seriously considered various enhanced plans during the relevant period(s); (ii) that by November 28, 1989, after months of task force studies,

cost analyses, implementation of outside consultant recommendations and the prior knowledge that VTP plans would not achieve the desired results, IBM had determined that whatever business vehicle (sale, closure or downsizing) was decided upon, headcount reduction was a "given" and had to be accomplished through implementation of an incentive plan greater than VTP; (iii) through Board approval, IBM accrued funds for purposes of enhanced plan implementation, an action which was required in calendar year 1990; and (iv) on August 1, 1990, IBM announced implementation of the enhanced plan using the very 2X + $25K formula which it had been seriously considering during the eligibility period(s). Nevertheless, the Sixth Circuit, on December 26, 1996, affirmed summary judgment in favor of IBM and retrospectively applied a bright-line definition of serious consideration to the facts of the case. Petitioners have filed their Petition for Writ of Certiorari in a timely manner.

REASONS FOR GRANTING THE WRIT

I. *MUSE v. IBM* DECIDED AN IMPORTANT ERISA FEDERAL QUESTION, I.E., THAT A FIDUCIARY HAS NO AFFIRMATIVE DUTY TO DISCLOSE MATERIAL MATTERS CONCERNING THE OFFERING OF AN ENHANCED SEVERANCE PLAN TO EXISTING PLAN PARTICIPANTS UNTIL THE PLAN IS ADOPTED, AND THIS COURT SHOULD RESOLVE THAT ISSUE.

In *Howe v. Varity Corp.*, 36 F.3d 746, 754 (8th Cir. 1994), *aff'd*, 516 U.S. ——, 134 L.Ed.2d 130, 116 S.Ct. 1065 (1996), the Eighth Circuit observed that: "[I]ndeed, in some instances a fiduciary duty goes beyond merely refraining from making affirmative misrepresentations. A fiduciary can also have a duty to disclose. . . ." Although this Court's affirmance did not require consideration or resolution of this issue, it is noteworthy that the majority found that:

> Because the breach of this duty is sufficient to uphold the decision below, we need not reach the question of whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.

Varity Corp. v. Howe, 516 U.S. ——, 134 L.Ed.2d 130, 145, 116 S. Ct. 1065, 1075 (1996). That question is now ripe for adjudication.

The *Varity Corp.* dissent addressed the subject of duty to disclose in the context of "the sponsor's future intentions with regard to terminating or reducing the level of benefits," predicated upon the dissent's opinion that no provision of ERISA requires such disclosure. *Id.*, 134 L.Ed.2d at 161, 116 S. Ct. at 1086. The dissent's concern about the consequences of an employee's inquiry into the possible effect of business decision on plan benefits, *id.*, 134 L.Ed.2d at 161 n. 9, 116 S. Ct. at 1087 n. 9, further underscores the danger that will continue to exist if this Court does not make clear the distinction between serious consideration of a business goal and serious consideration of an enhanced plan and the fiduciary duties that attach thereto, a danger explicit in *Muse v. IBM*.

In *Muse v. IBM*, the court observed that:

> The law is not well-developed, however, with respect to whether fiduciaries must disclose plan changes that have been proposed or considered but not yet adopted.

[Appendix at 5a].[1]

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[1] Compare this issue and the identical language used by the Second Circuit in *Pocchia v. NYNEX*, 81 F.3d 275, 278 (2nd Cir.), *cert. denied*, 117 S.Ct. 302 (1996). The Sixth Circuit in *Muse* additionally extracted and used, *verbatim*, a number of passages from *Pocchia* without referencing that decision (*e.g.*, compare Appendix at 6a-7a with 81 F.3d at 278), yet the factual situations and holdings are not the same. In *Pocchia*, the court held that

In total disregard of the notion of serious consideration of an enhanced plan and in an effort to respond to the issue posed, the court held:

> Until a plan is adopted, there is no plan, only the possibility of one. A fiduciary is therefore generally not required to disclose changes in a benefit plan before it is adopted. Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." * * * Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals. For example, if IBM had been forced to disclose prematurely the fact that it was studying the closing or selling of the Lexington site, which manufactured most of the IBM's typewriters, the information could have been used by competitors to damage IBM seriously.

[*Id.* at 6a-7a].

The import of this holding is that there is no duty to give truthful responses (when inquiry is made) and no affirmative duty to disclose (when inquiry is not made)

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there was no affirmative duty to disclose plan changes *in the absence of inquiry* by the employee and used the plan adoption date as its bright-line rule. 81 F.3d at 279. That was the limited issue that it was deciding. By inference, the decision suggests that such a duty exists if inquiry was made, meaning that the duty to be truthful remains. In *Muse*, the court held that not only was there no affirmative duty to disclose until the plan was adopted but, apparently, *even if inquiry is made*, there still is no duty of honesty until the bright-line point is reached, *i.e.*, the particular plan is finalized and in place.

the serious consideration being given by an employer/fiduciary to an enhanced early retirement plan until that plan has been adopted. The flaw in the court's reasoning is that whether IBM was studying closure or sale of the Lexington site is a matter of pure internal deliberations, disclosure of which would be of no benefit to an employee who is being induced to retire under that lesser plan. Under *Muse*, the consideration finally prompting such duty of honesty is not consideration of the plan itself; rather, it is the insignificant and irrelevant serious consideration of the business decision, a matter with which ERISA does not concern itself. Pursuit of a legitimate business reason may be the motivation for an employer to consider an enhanced plan, but the employee does not have "a need to know that reason." All that is important to him or her is information concerning the serious consideration being given to an enhanced plan.

The need for this Court to consider this issue also is evident from the attention that it has drawn from a number of Courts of Appeals. The Sixth Circuit, in *Drennan, supra,* held that:

> GM was impressed with a fiduciary duty to keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan.

Drennan, 977 F.2d at 252. *See*, also, *Swinney v. General Motors Corp.*, 46 F.3d 512, 521 n. 4 (6th Cir. 1995) [ERISA imposes on fiduciaries a "duty to tell employees that it might someday offer another benefit [if] it is seriously considering that other benefit at the time."].

In *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750, 751 (D.C. Cir. 1990), the court held that a fiduciary "has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the

relationship" and that "a beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word." In the Third Circuit, *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) instructs that "this duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."

In *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993), the court opined that "fiduciaries must also communicate material facts affecting the interests of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not." *Contra, Pocchia v. NYNEX Corp., supra*, 81 F.3d at 279. ["While NYNEX had a fiduciary duty not to make affirmative misrepresentations or omissions, it did not have a duty to disclose proposed changes in the absence of inquiry by Pocchia. NYNEX only came under a duty to voluntarily disclose once it adopted the plan changes."] Finally, *see Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488 (10th Cir. 1995), wherein the Tenth Circuit relied upon the holdings of the Sixth Circuit (prior to its about-face in *Muse v. IBM*) as follows:

> Since *Berlin*, the Sixth Circuit has gone further and found that ERISA may impose on fiduciaries a duty to disclose material matters, though such a duty does not require the fiduciary "to disclose its internal deliberations nor interfere with the substantive aspects of the [collective] bargaining process. *Drennan*, 977 F.2d at 251.

Maez, 54 F.3d at 1501 n. 6.

The foregoing decisions suggest that guidance as to when this affirmative duty to disclose arises is needed. That guidance must come from this Court.

The Sixth Circuit holding goes beyond Richard Muse; its impact goes beyond the several hundred plan participants in the Muse Class; its has far reaching implications that will affect tens of thousands of future potential plan participants in a multitude of future enhanced plans. Those implications extend far beyond the $100,000 impact on Richard Muse and beyond the $30 million to $40 million loss to the Muse Class members, as literally billions of otherwise protected benefit dollars can be placed in jeopardy. The Sixth Circuit holding affects the decisions in the Courts of Appeals hereinabove discussed because the employer's interests have been made paramount to those of the plan participant. It is appropriate for this Court to consider the affirmative duty to disclose through grant of this Petition.

II. *MUSE v. IBM* IS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT REGARDING ERISA FIDUCIARY DUTIES AND THE DETERMINATION OF WHEN THESE DUTIES ARISE

Two separate but distinct principles have been established by this Court in the context of fiduciary duties owed to plan participants. The first, the duty of loyalty, was expressed in *Varity Corp.* in terms of public policy:

> ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a). To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, ..."

134 L.Ed.2d at 145, 116 S.Ct. at 1074. (citations omitted). Similarly, Congressional intent evidencing such public policy is codified in 29 U.S.C. §§ 1001(a) and (b).

The second principle, materiality and the duty to disclose, was articulated in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), and first applied in ERISA litigation in *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136, 139 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993) and *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993) [*"Fischer I"*]. Rejected in *Basic, Kurz* and *Fischer I* was the application of a bright-line test which, although easier to follow, would thwart the policy reasons advanced in the [Securities Act] and [ERISA]. As stated by this Court in *Basic:*

> Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive . . . "The determination [of materiality] requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him . . . After much study, the Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula. Courts also would do well to heed this advice.

485 U.S. at 236.

In *Basic*, the lower court (Sixth Circuit) rejected a bright-line test that held that preliminary merger negotiations do not become material until an "agreement-in-principle" as to the price and structure of the transaction has been reached between the parties but substituted in its place a rule described as being "equally insensitive" to the policies that protect the rights of investors. In referring to the "agreement-in-principle" test, this Court observed that "[b]y definition, then, information concerning any negotiations not yet at the agreement-in-principle stage could be withheld or even misrepresented without a

violation of Rule 10(b)5." *Basic* at 233. This is the same evil presented herein. Applying *Basic* in an ERISA setting, materiality of a representation, through direct answer or through silence, depends upon the significance that a reasonable, prudent plan participant would place upon the misrepresented or withheld information. One must measure that materiality as viewed by the one for whom the information is intended, not by the one charged with the duty of providing it.

Applying the principle set forth in *Basic* and *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), the *Fischer I* court clearly held:

> Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, *the more seriously a plan change is being considered, the more likely a misrepresentation*, e.g., that no change is under consideration, will pass the threshold of materiality.

Fischer I, 994 F.2d at 135. (emphasis added).

That the Sixth Circuit discarded these principles in *Muse* is self-evident. The Sixth Circuit instead has determined that the duty that otherwise mandates single minded devotion to the welfare of the beneficiaries need not concern a fiduciary until "a company focuses on a particular plan for a particular purpose." [Appendix at 7a]. Although acknowledging earlier in its opinion that the particular purpose, the primary goal, to which IBM had devoted its efforts was the reduction of the number of employees at the Lexington site [*id.* at 4a], and although IBM, at the highest level of authority, had set aside the funding for the incentive plan needed to accomplish that particular purpose, these acts do not evidence "purpose" with sufficient particularity, according to the Sixth Circuit. *Can it be said as a matter of law that this taking of a $300 million charge against profits for the*

purpose of funding an enhanced plan does not constitute serious consideration of that plan? In like fashion, the "particular plan" is defined by the Sixth Circuit with equal constriction. As a result, the court has designed a rigid formula that is as "equally insensitive" as the one it provided in *Basic* and which this Court rejected.

In sum, applying the "particular plan for a particular purpose" test and requiring that it must involve a *unique event* in the context of a duty of loyalty owed to plan participants under *Varity Corp.* is the ERISA equivalent of adopting the "agreement-in-principle" bright-line test rejected in *Basic*. Fact-specific inquiries and materiality have been replaced by a standard under which communicated information rises to a material level only when the employer deems the information to be certain in its last details from a business perspective. As described by this Court in *Basic*, the "agreement-in-principle" test is "directed solely at the comfort of corporate managers." 485 U.S. at 236. So, too, is the *Muse* test. Such a defining structure for the determination of when the communications would become material in the ERISA context guarantees that beneficiaries will be the last to receive information that would enable them to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan.

By attaching the point of serious consideration to a bright line, non-ERISA based "business purpose" event, the Sixth Circuit has written the script for every employer/fiduciary hereafter to create unrelenting mischief by simply keeping some business detail unsettled, some business related variable open, until the last moment possible before announcing an enhanced plan. For certain, such condoned manipulation under the new standard assures that serious consideration never will arise until the eligibility period for participation in the lesser plan has passed. The enhanced plan would then spring into existence fully "packaged," as if it fell from the skies in that

final form. By so ruling, *Muse* is in conflict with the settled teachings of this Court.

III. *MUSE v. IBM* IS IN CONFLICT WITH RELEVANT DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND WITH RELEVANT DECISIONS OF THE SIXTH CIRCUIT.

Since 1988, ERISA litigation has generated numerous appellate decisions regarding the concept of serious consideration and attendant fiduciary duties. *Muse v. IBM* is in conflict with (i) existing Sixth Circuit law, as embodied in *Berlin v. Michigan Bell Tel. Co., supra,* and *Drennan v. General Motors Corp., supra*; (ii) those decisions rendered by other Circuit Courts of Appeals which relied upon *Berlin* and *Drennan*; and (iii) two decisions of the Third Circuit. These conflicts are irreconcilable.

In both *Berlin* and *Drennan,* the Sixth Circuit required a fact-intensive examination of the events that ultimately led to a second offering of an incentive plan: whether an enhanced plan was ultimately adopted was irrelevant to the determination of serious consideration (employer has no duty to predict an ultimate decision to offer a plan). For example, in *Berlin,* the court looked at such events as discussions and cost-effectiveness studies concerning an enhanced plan and held that the determination of serious consideration was a question of material fact. 858 F.2d at 1164. In *Drennan,* management's continued discussions, rejections (because of expense) and renewed interest in and further exploration of class participation in a second offering was evidence of serious consideration, again a question of material fact. 977 F.2d at 251-52.

Muse v. IBM effectively eliminates any fact finding concerning events occurring prior to the decision to offer an enhanced plan. No longer are management's efforts with respect to the enhanced plan itself germane to the determination. Instead, the spotlight is now focused upon consideration of business purpose and the unique triggering

event. The fact-specific requirements of materiality of representations concerning a plan, as espoused in *Berlin, Drennan* and *Basic, Inc. v. Levinson, supra,* have been implictly overruled by *Muse v. IBM.*

The *Berlin* and *Drennan* principle that serious consideration is fact-intensive with respect to consideration of an enhanced plan has been followed in the Second Circuit in *Mullins v. Pfizer, Inc.,* 23 F.3d 663, 669 (2nd Cir. 1994); in the Third Circuit in *Fischer I, supra,* 994 F.2d at 135; *Kurz v. Philadelphia Elec. Co., supra,* 994 F.2d at 139; in the Eighth Circuit in *Wilson v. Southwestern Bell Tel. Co.,* 55 F.3d 399, 405 (8th Cir. 1995); and in the Tenth Circuit in *Maez v. Mountain States Tel. & Tel., Inc., supra,* 54 F.3d at 1500. Thus, because *Muse v. IBM* conflicts with *Berlin* and *Drennan,* it now conflicts with the foregoing decisions of at least four other Circuit Courts of Appeals.

Additionally, in *Kurz,* the Third Circuit specifically rejected imposition of a bright-line rule on substitution of a materiality standard and, citing to *Basic,* stated that "[t]ying 'serious consideration' to a single objective event in the present context would work unfairly in some instances." 994 F.2d at 139. It commented that under the bright-line test suggested by PeCo in *Fischer I,* the letter sent by its CEO announcing that an early retirement plan would be proposed to the Board of Directors could not have amounted to "serious consideration" because no proposal had as yet been submitted to the Board. *Id.* That is basic unfairness and the court so recognized it. *Muse v. IBM* conflicts with *Kurz* to the extent that it utilizes a bright-line test to tie serious consideration to a single business event unrelated to consideration of the plan itself.

Finally, *Muse v. IBM* conflicts with the newest Third Circuit decision, being *Fischer v. Philadelphia Elec. Co.,* 96 F.3d 1533 (3d Cir. 1996), *cert. denied,* —— U.S. ——, 1997 U.S. LEXIS 1665 (March 17, 1997)

[*"Fischer II"*]. Therein, the court indicated that as in any case where the misrepresentation in question is the statement that [no change in benefits is under consideration], "the only factor is the degree of seriousness with which the change was in fact being considered." *Id.* at 1538. The court, admitting that in *Fischer I* it gave little attention to the details of the term "serious consideration," attempted to provide some guidelines. In its view, serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. *Id.* at 1539. Notably, the court repeatedly stressed that this was *not* a bright-line test but agreed to adhere to its holding in *Kurz* that the determination is inherently fact-specific and flexible.

In *Muse v. IBM,* the court gave no guidance whatever to serious consideration but did hold that a particular plan had to be contemplated in concrete fashion. [Appendix at 8a]. *Fischer II*, in conflict with *Muse v. IBM*, held that factor one (the "specific proposal") "does not mean that the proposal must describe the plan in its final form. A specific proposal can contain alternatives, and the plan as finally implemented may differ somewhat from the proposal." 96 F.3d at 1540. As important is the conspicuous absence in *Fischer II* of any requirement that serious consideration must be tied to a single event, i.e., attainment of the "agreement-in-principle" which is part and parcel of an identifiable business purpose for which the enhanced plan is offered. Without saying so, *Muse v. IBM* extended the bright-line test created in *Pocchia* to the point that serious consideration cannot arise until the plan has been adopted. *Fischer II* rejected *Pocchia. Id.* This conflict, as with the others discussed above, requires resolution by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-6261

RICHARD R. MUSE, *et al.*,
Plaintiffs-Appellants,

PATSY S. ADAMS, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky
91-00122—Karl S. Forester, District Judge

December 26, 1996, Decided
December 26, 1996, Filed

Before: MARTIN, Chief Judge; CONTIE, Circuit Judge; CARR, District Judge.*

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

BOYCE F. MARTIN, JR., Chief Judge. In this class action suit, plaintiffs appeal the district court's order granting their former employer's motion for summary judgment and dismissing their Employee Retirement Income Security Act claims with prejudice. Plaintiffs also appeal the district court's decision to deny their cross motion for summary judgment.

Plaintiffs retired from the Lexington, Kentucky site of International Business Machines Corporation pursuant to one of three voluntary early retirement programs offered by IBM from September 28, 1989, through March 31, 1990. The Voluntary Transition Payment Program, which we will follow the lead of parties and also call VTP-1, was offered on September 28, 1989, to IBM employees at four sites in the United States, including the Lexington site. Pursuant to VTP-1, eligible employees who terminated their employment prior to December 29 would receive one week of salary for every six months of service up to a maximum of fifty-two weeks of salary. On December 5, IBM offered the second Voluntary Transition Payment Program, which we will call VTP-2, to all IBM employees. Pursuant to VTP-2, eligible employees who terminated their employment after December 31, 1989 but before March 31, 1990, would receive the same benefits as those who accepted the VTP-1 program. Finally, on January 22, IBM offered the third Voluntary Transition Payment Program, a five-year pre-retirement leave of absence, which we will refer to as VTP/LOA. IBM extended the VTP/LOA to all IBM employees who were within five years of retirement eligibility and otherwise qualified for the VTP-1 and VTP-2 programs. VTP/LOA gave eligible employees who assumed leave status by March 31, 1990, the same benefits as those who accepted the VTP-1 and VTP-2 programs.

In the past, IBM had offered other early retirement programs to its employees whereby eligible employees re-

ceived a bonus of two weeks of salary for every six months of service up to a maximum bonus of 104 weeks salary, along with an additional payment of $25,000.00. The plaintiffs knew of these former arrangements. The plaintiffs allege that they inquired of their supervisors whether such a program would be offered to them in the future, and, based on their supervisors' negative response, accepted the VTP-1, VTP-2, or VTP/LOA plan.

On August 1, 1990, IBM offered its Lexington employees yet another program, the Lexington Transition Payment Program or LTPP. Pursuant to LTPP, eligible Lexington employees who departed from IBM between September 28 and December 31, 1990 would receive the full bonus plan offered in the past, being two weeks salary for each six months of service with a 104 week cap plus $25,000.00. This plan, which was offered only to employees at the Lexington plant, was adopted by IBM after the company made a decision to sell the Lexington plant to Clayton and Dublier, who required further downsizing.

On April 23, 1991, the plaintiffs sued IBM claiming five ERISA counts and five common law counts. On April 15, 1992, the district court certified the class and two sub-classes of plaintiffs and dismissed the plaintiffs' common law claims. Following extensive discovery, the parties filed cross-motions for summary judgment on November 30, 1993.

Plaintiffs allege that they would have chosen to participate in the superior benefit plan had IBM not negligently or intentionally misrepresented to the plaintiffs that no further early retirement plans would be offered. According to plaintiffs, IBM violated ERISA by breaching its fiduciary duty to plaintiffs; specifically, the plaintiffs claim that IBM was compelled to inform plaintiffs that the company was "seriously considering" the LTPP offer. In sum, plaintiffs argue that they should have been provided with more information to enable them to make more in-

formed decisions with respect to the financial consequences of their retirement.

In its answer, IBM challenged plaintiffs' standing, claiming that all three of the VTP eligibility periods preceded plaintiffs' claim. IBM maintained that its primary goal was to reduce the number of employees at the Lexington facility. According to IBM, its serious consideration of the LTPP offer did not begin until June 19, 1990; all it seriously considered before that date was the general concept of closing, selling, or downsizing the Lexington facility in order to accomplish its primary goal.

Pursuant to 28 U.S.C. § 636(b), the district court designated a magistrate judge to hear and prepare proposed findings of fact and a recommendation for the disposition of the cross motions for summary judgment. The magistrate judge determined that no reasonable trier of fact could conclude that IBM seriously considered offering LTPP to its Lexington employees before April 19, 1990, the date IBM began negotiations to sell the Lexington plant. According to the magistrate judge, IBM's fiduciary responsibilities arose on April 19 and not before that date. Consequently, the magistrate judge recommended that IBM's motion for summary judgment be granted and the plaintiffs' cross motion be denied.

Plaintiffs filed objections to the report and recommendation. They argued that the magistrate judge erred: first, by misapplying the law to the facts; second, by misinterpreting the concept of "serious consideration"; and third, by determining that the date of serious consideration was April 19, 1990. IBM filed a response to those objections. Reviewing the record, the district court made a de novo determination of these objections, overruled them, adopted the magistrate judge's recommendation, denied plaintiffs' motions for summary judgment, and granted IBM's motion for summary judgment.

We review grants of summary judgment de novo. The district court's order for summary judgment should stand

if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *Southeastern Oakland County Resource Recovery Auth. v. Madison Heights*, 5 F.3d 166 (6th Cir. 1993).

Generally, employers have no fiduciary duty under ERISA regarding the adoption, modification, or termination of employee benefit plans. If, however, an employer gives serious consideration to implementing a second offering of severance plan benefits, it is well-settled that the employer has a fiduciary duty not to make misrepresentations to potential plan participants about the second offering. *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), cert. denied, 508 U.S. 940, 124 L. Ed. 2d 639, 113 S. Ct. 2416 (1993). The law is not well-developed, however, with respect to whether fiduciaries must disclose plan changes that have been proposed or considered but not yet adopted.

The plaintiffs claim that the district court passed over certain undisputed facts which show that IBM began seriously considering offering an enhanced benefit plan before the last plaintiffs left IBM on March 31, 1990. Those facts, plaintiffs argue, create a genuine issue of material fact which precludes the dismissal of their claims by summary judgment.

IBM responds to plaintiffs' claim by disputing what the facts show. According to IBM, the plaintiffs have produced no evidence to show that IBM's serious consideration of an enhanced plan began during the relevant period, that is, while plaintiffs were still debating the merits of the other plans. IBM suggests that case law and public policy compel a narrow interpretation of the term "serious consideration" which excludes the kind of internal deliberations which took place at IBM during the relevant period. *Drennan*, 977 F.2d at 251. The

company further maintains that summary judgment was the only proper disposition given that the record contains no evidence indicating that the LTPP plan was anything other than IBM's reaction to the unique event of the eventual sale of the Lexington facility to Clayton & Dubilier.

Any misrepresentations IBM made to the plaintiffs after it gave serious consideration to the implementation of an enhanced incentive plan could constitute a breach of its fiduciary duty under ERISA. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). However, misrepresentations made before serious consideration trigger no such duty. See *Swinney v. General Motors Corp.*, 46 F.3d 512, 520 (6th Cir. 1995) (quoting *Drennan*, 977 F.2d at 251). The critical question, therefore, is not whether IBM seriously considered offering the enhanced benefit plan but when the company seriously considered offering the plan.

In order to establish that IBM was subject to a fiduciary duty under ERISA, plaintiffs must establish that IBM seriously considered offering an enhanced benefit plan during the relevant period. Plaintiffs do not suggest a specific definition of the term "serious consideration," but argue only that the term is open-ended enough to encompass IBM's actions. Clear indicia of such consideration, they propose, are the studies IBM conducted and the November 1989 decision to take an accrual against 1989 earnings, allegedy based in part on those studies.

Until a plan is adopted, there is no plan, only the possibility of one. A fiduciary is therefore generally not required to disclose changes in a benefit plan before it is adopted. Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." H.R. Rep. No. 533, 93d Cong., 2d Sess. VI (1974), reprinted in 1974 U.S.C.C.A.N. 4639. Insisting on disclosure during

the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals. For example, if IBM had been forced to disclose prematurely the fact that it was studying the closing or selling of the Lexington site, which manufactured most of IBM's typewriters, the information could have been used by competitors to damage IBM seriously.

The exception of serious consideration does not apply until a company focuses on a particular plan for a particular purpose. An unique event, the sale of the Lexington plant, triggered the offering of the enhanced plan. Although the sale had been contemplated earlier along with other options for the Lexington plant, it was not until IBM made a definite decision to sell the Lexington plant and was told by the buyer that further downsizing was necessary that IBM focused on this particular plan for a particular purpose. *Swinney*, 46 F.3d at 520 ("changing circumstances . . . might require an employer to sweeten its severance package"). Here, there is no convincing evidence that suggests that IBM studied the possibility of enhanced benefit plans for any reason other than to gain a general appreciation of its options. Plaintiffs' concept of the term "serious consideration" is inconsistent with the ERISA goals of encouraging employers to offer welfare benefit plans and of minimizing the financial and administrative burdens on employers. *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 131 L. Ed. 2d 695, 115 S. Ct. 1671, 1677 (1995); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 158, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985). This Court has also recently stated that "an employer should not be forever deterred from giving its employees a better deal merely because it did not clearly indicate to a previous

employee that a better deal might one day be proposed." *Swinney*, 46 F.3d at 520. Even if the plaintiffs had proved that IBM seriously considered the plan, they failed to prove that IBM breached its fiduciary duty under ERISA. Plaintiffs claim that IBM materially misrepresented facts concerning the incentive plan and failed to disclose the progress of its serious consideration to plaintiffs. The Supreme Court recently held that plan administrators who "participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense" fail to act "solely in the interest of the participants and beneficiaries," and violate the duty of loyalty in Section 404(a)(1) of ERISA. *Varity Corp. v. Howe*, —— U.S. ——, 116 S. Ct. 1065 (1996).

The record does not contain sufficient evidence to establish that IBM knowingly deceived plaintiffs about the possibility of an enhanced plan. The only suggestion of any improper behavior by IBM is the June 14, 1990, memo from an IBM employee warning against the enhanced plan because of the expected back-lash by the retirees covered by any of the three VTP plans. While it suggests that the employee knew the impact of IBM's actions, the memo in no way suggests that during the relevant time period the employee or IBM had engaged in a targeted plan to deceive the plaintiffs and thus reduce their benefits. In fact, the memo appears to show that the employee, if not IBM, had not previously contemplated the enhanced plan in any concrete fashion. Plaintiffs ask this court to reinstate their five common law claims either as federal ERISA common law claims or as state common law claims. In its broad preemption provision, ERISA provides that it "supersedes any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." § 514(a), 29 U.S.C. § 1144(a) (1988). The nature of ERISA preemption is not altered by the fact that some plaintiffs may be left without a meaningful remedy. *Tolton v. American*

Biodyne, Inc., 48 F.3d 937, 943 (6th Cir. 1995). State law claims based on an employer's alleged misrepresentations about the availability of a benefit plan are sufficiently "related to" an ERISA plan to be preempted by the statute. *Swinney*, 64 F.3d 512 (6th Cir. 1995).

Plaintiffs also contend that if their state law claims are preempted, those claims may be repackaged and saved as claims arising under federal common law. However, federal common law is developed under ERISA only in those instances in which ERISA is silent or ambiguous. *Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 735 (6th Cir. 1992). Plaintiffs' state law claims do not fall into that category; they seek to recover for conduct that falls within the purview of Section 404 of ERISA. Plaintiffs' common law claims are preempted by ERISA and cannot be reasserted as separate claims arising under federal common law.

Judgment AFFIRMED.

APPENDIX B

[Filed Sep. 5, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 91-122

RICHARD R. MUSE, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants.

OPINION AND ORDER

This matter is before the Court upon the parties cross-motions for summary judgment. The plaintiffs, former employees of the defendant, International Business Machines Corporation ("IBM"), who retired from IBM's Lexington facility pursuant to one of three early retirement programs offered by IBM from September 28, 1989 through March 31, 1990, allege that IBM violated certain fiduciary duties owed to them pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Both parties have filed motions for summary judgment. The Court referred this action to the United States Magistrate Judge for consideration and recommendation pursuant to 28 U.S.C. § 636(b).

The Magistrate Judge filed his proposed findings of fact and recommendation on July 28, 1995. The factual findings made by the Magistrate Judge are as follows. In an effort to reduce the size of its workforce at the Lexington site, as well as other sites throughout the United States,

IBM offered several voluntary early retirement programs to its workforce. The first, the Voluntary Transition Payment Program ("VTP-1"), was offered on September 28, 1989 to IBM employees at four sites in the United States, including the Lexington site. Pursuant to VTP-1, eligible employees who terminated their employment prior to December 29, 1989 would receive one week of salary for every six months of service up to a maximum of fifty-two weeks of salary. Thereafter, on December 5, 1989, IBM offered the Voluntary Transition Payment Program ("VTP-2") to IBM employees company-wide. Pursuant to VTP-2, eligible employees who terminated their employment after December 31, 1989 but before March 31, 1990 would receive the same benefits as those who accepted the VTP-1 program. Finally, on January 22, 1990, IBM offered the Voluntary Transition Payment Program/Five-Year Pre-Retirement Leave of Absence ("VTP/LOA") to all IBM employees who were eligible for participation in VTP-1 and VTP-2 and were within five years of retirement eligibility. Pursuant to VTP/LOA, eligible employees who assumed leave status by March 31, 1990 would receive the same benefits as those who accepted the VTP-1 and VTP-2 programs.

Because the plaintiffs were aware that IBM had previously offered other early retirement programs to its employees at other sites throughout the United States whereby eligible employees received two weeks of salary for every six months of service up to a maximum salary of 104 weeks, along with an additional payment of $25,000.00, the plaintiffs allege that they inquired of their supervisors as to whether any such program would be offered to them in the future. Based on their supervisors' negative response, the plaintiffs accepted participation in the VTP-1, VTP-2, or VTP/LOA programs.

Thereafter, on August 1, 1990, IBM offered the Lexington Transition Payment Program ("LTPP") to its employees at the Lexington facility. Pursuant to LTPP, eligible employees who departed from IBM between Septem-

ber 1990 and December 1990 would receive two weeks of salary for each six months of service up to a maximum of 104 weeks of salary, along with an additional payment of $25,000.00. The basis of the plaintiffs' complaint is that had the defendants not negligently or intentionally misrepresented to the plaintiffs that no further early retirement programs would be offered, they would have chosen to wait to participate in LTPP and would have received substantially greater benefits. The plaintiffs further argue that IBM violated its fiduciary duty to the plaintiffs by failing to inform the plaintiffs that it was seriously considering offering the LTPP program. On the other hand, IBM argues that the plaintiffs lack standing to bring this action because their claim did not come into existence until July 12, 1990, which was well after the eligibility periods for the VTP-1, VTP-2, and VTP/LOA. Furthermore, IBM contends that although it was seriously considering the closure, sale, or downsizing of the Lexington facility during the eligibility periods of VTP-1, VTP-2, and VTP/LOA, and while it was seriously considering various programs to reduce the number of employees at the Lexington facility during the relevant periods, it did not seriously consider offering the LTPP program until June 19, 1990.

In fashioning his recommendation, the Magistrate Judge relied first on *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). In *Berlin,* the Sixth Circuit Court of Appeals recognized the general principle that although an employer's decision to offer an ERISA plan is a nonfiduciary business decision, an employer's decision regarding the administration of an existing plan is fiduciary in nature. *Id.* at 1163. The plaintiffs in *Berlin* were management-level employees with the defendant, Michigan Bell Telephone Company ("MBT"). *Id.* at 1156. In an effort to reduce the number of management-level employees, MBT offered a program known as Management Income Protection Plan ("MIPP") from October 1, 1980 through December 1, 1980. *Id.* at 1157. Due to con-

tinued financial problems and a continued surplus of management-level employees, MBT again considered offering MIPP; however, this idea was consistently rejected due to cost. *Id.* at 1160. During this time, management level employees began inquiring about the possibility of future general MIPP programs. *Id.* at 1159-60. MBT responded, as late as May 18, 1982, by stating that MIPP would not be offered again. *Id.*

However, on June 11, 1982, MBT decided that MIPP would be implemented again and that a general MIPP offering would be made to management-level employees retiring between June 1, 1982 and July 31, 1982. *Id.* at 1160. Thereafter, the plaintiffs filed suit claiming ERISA violations based on MBT's representations that MIPP would not be offered again. *Id.* at 1156. The issue before the court was exactly when MBT concluded that MIPP would be offered again. According to the court, the record showed that management surplus and methods for work force reduction were discussed throughout the relevant period. *Id.* at 1159-60. Moreover, MIPP was discussed by MBT officials in a number of meetings, and consideration of MIPP by high-level managers commenced as early as March 1982. *Id.* Written cost-effectiveness studies were also undertaken on May 6, 1982 and May 20, 1982. *Id.* at 1160. Moreover, "[o]n June 1, 1982, a meeting was held at MBT to further design and discuss a MIPP offering, . . . and a recommendation was made that MIPP would be offered again." *Id.*

Although an employer's decision to offer an ERISA plan is a nonfiduciary business decision, the appellate court disagreed with the district court's conclusion that "any communications or representations made prior to such a decision were also nonfiduciary." *Id.* at 1163. Instead, the court held:

> [W]hen serious consideration was given by MBT to implementing MIPP by making a second offering (a question of material fact), then MBT as the plan

> administrator and/or . . . the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering.

Id. at 1163-64.

The Magistrate Judge also relied on *Drennan v. General Motors Corporation*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993). In *Drennan*, the plaintiffs, employees of the defendant, General Motors Corporation ("GM"), with ten or more years of seniority, were laid off when GM closed its plant in Norwood, Ohio in August, 1987 because of financial difficulties. *Id.* at 248. On September 15, 1987, GM notified the plaintiffs of their right to participate in the Supplemental Unemployment Plan Separation ("SUB") program. *Id.* Pursuant to SUB, eligible employees who participated in SUB were entitled to receive a lump sum. *Id.* At the same time, GM had another benefit plan in effect, the Voluntary Separation of Employment Program ("VTEP"). *Id.* VTEP was available to GM employees with ten or more years of seniority, and provided substantially enhanced benefits as compared to the benefits of SUB. *Id.* However, the collective bargaining agreement in effect at that time did not require GM to offer VTEP to the plaintiffs. *Id.*

After being laid off, but before agreeing to participate in SUB, the plaintiffs inquired of their supervisors about their right to participate in VTEP. *Id.* at 248-49. GM consistently denied that VTEP would become available to the plaintiffs. *Id.* Consequently, the plaintiffs chose to participate in SUB. *Id.* Thereafter, on April 12, 1988, GM announced that VTEP was being offered to all GM employees. *Id.* at 249. Because the plaintiffs had already accepted SUB, they were not allowed to participate in VTEP. *Id.* The plaintiffs filed suit claiming violations of ERISA based on GM's representations that VTEP would not be made available to them. *Id.* at 248.

The court found that although GM had consistently denied that VTEP would become available to the plaintiffs, GM had in fact been seriously considering offering VTEP to all its employees. *Id.* at 249. The court held that GM's serious consideration of VTEP triggered its fiduciary duties to "keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan." *Id.* at 252.

Based on *Berlin* and *Drennan*, the Magistrate Judge next considered whether IBM gave serious consideration to offering LTPP to the employees at the Lexington facility during the eligibility periods for the VTP-1, VTP-2, and VTP/LOA programs (i.e. September 28, 1989 to March 31, 1990). Beginning in 1988, IBM began offering early retirement plans in an effort to reduce its workforce without violating its policy of not laying off employees. As early as March 1989, IBM was considering the sale, downsizing, or closure of the Lexington facility and recognized the need to reduce the number of employees at the Lexington facility. Although IBM recognized that VTP-1 would not sufficiently reduce the number of employees at the Lexington facility, it was offered to employees on September 28, 1989. In November 1989, as a means of further reducing the size of the workforce, IBM officials suggested offering an early retirement plan to employees at the Lexington facility with two times separation pay plus $25,000.00; that is, a program with benefits substantially similar to those in the LTPP program. At that time, the suggestion was rejected. By the first of December 1989, IBM had decided that the Lexington facility would be sold, not closed. Because IBM still desired to reduce the size of the workforce, VTP-2 and VTP/LOA were offered to employees at the Lexington facility on December 5, 1989 and January 22, 1990, respectively.

By the end of January, IBM had begun to seriously consider the sale of the Lexington facility, and on January 24, 1990, IBM's management committee gave authority to company officials to proceed toward a possible sale of the Lexington facility. In late February or early March, IBM came into contact with Clayton & Dubilier, the company which ultimately purchased the Lexington facility. As the result of negotiations, both IBM and Clayton & Dubilier agreed that the number of employees at the Lexington facility would have to be further reduced in order to successfully negotiate a sale. On April 19, 1990 Clayton & Dubilier made a presentation to IBM officials regarding its interest in purchasing the Lexington facility. As a result of Clayton & Dubilier's offer, IBM began considering several means for reducing its Lexington workforce in late April 1990. It was at this time that IBM began to seriously discuss what came to be known as LTPP. Discussions on this subject continued through May and into June 1990.

On June 19, 1990, an IBM task force decided that it would recommend LTPP to IBM's management committee. The task force further decided to recommend that LTPP not be retroactive to employees at the Lexington facility who had accepted one of the VTP programs. The management committee adopted the task force's recommendations on July 12, 1995, and LTPP was offered to employees at the Lexington facility on August 1, 1995.

Based on his factual findings and the relevant case law, the Magistrate Judge determined that "no reasonable trier of fact could conclude that IBM gave 'serious consideration' to offering LTPP to employees at the Lexington facility until April 19, 1990." According to the Magistrate Judge, it was at this time that IBM's duties under ERISA arose. Although IBM considered offering a benefit plan similar to LTPP as early as November 1989, the Magistrate Judge found that had Clayton & Dubilier not expressed an interest in purchasing the Lexington facility,

there is no evidence from which a reasonable trier of fact could conclude that IBM would have seriously considered offering LTPP to employees at the Lexington facility. Consequently, the Magistrate Judge determined that IBM had no duty towards the plaintiffs with regard to the offering of LTPP until April 19, 1990. Consequently, the Magistrate Judge recommended that IBM's motion for summary judgment be granted and the plaintiffs' motion for summary judgment be denied.

The plaintiffs filed objections to the report and recommendation on August 10, 1995. This Court must make a *de novo* determination of those portions of the Magistrate Judge's report and recommendation to which objection is made. 28 U.S.C. § 636(b)(1). First, the plaintiffs argue that the Magistrate Judge misapplied the controlling law to the facts. Relying on *Berlin* and *Drennan*, the plaintiffs argue that the Magistrate Judge improperly focused his analysis on determining when IBM, in concert with Clayton & Dubilier, gave serious consideration to making the final design of the LTPP plan available to its Lexington facility employees. The plaintiffs contend that the Magistrate Judge should have focused on when IBM gave serious consideration to making any plan available to its Lexington facility employees.

Second, the plaintiffs argue that the Magistrate Judge misinterpreted the serious consideration concept by hinging serious consideration upon a precise agreement between IBM and Clayton & Dubilier. According to the plaintiffs, neither *Berlin* nor *Drennan* indicate that serious consideration requires a meeting of the minds of two parties. Instead, the plaintiffs argue that it is only IBM's serious consideration of the plan that triggers IBM's fiduciary duties. The plaintiffs also contend that the Magistrate Judge misinterpreted the serious consideration concept by failing to grasp the progressive nature of serious consideration. By designating the commencement of negotiations between IBM and Clayton & Dubilier as deter-

minative of IBM's serious consideration, the plaintiffs argue that the Magistrate Judge ignored the fact that this event was a single occurrence in a connected series that began as early as March 1989.

Third, the plaintiffs argue that the proposed finding of fact concerning the date of serious consideration, April 19, 1990, is clearly erroneous. According to the plaintiffs, the issue is not when IBM began serious consideration of LTPP, but rather when it began serious consideration of making a financial assistance program" available to its Lexington facility employees. The plaintiffs also point out that by the summer of 1989, IBM had retained a consultant to perform certain studies. Based on the consultant's analysis, IBM determined that a reduction in the workforce through incentive plans would be necessary regardless of whether IBM closed, downsized, or sold its Lexington facility. As a result, VTP-1, VTP-2, and VTP/LOA were implemented. The plaintiffs contend that IBM knew in advance that these programs would not sufficiently reduce the size of the Lexington workforce and that additional programs would be necessary in the future. The plaintiffs further argue that models for the plan that was later dubbed LTPP were developed no later than early November 1989. Based on these objections, the plaintiffs argue that serious consideration of an incentive plan for the Lexington facility commenced in the fall of 1989.

The Court, having examined the record and having made a *de novo* determination on the record, is in agreement with the Magistrate Judge's proposed findings of fact and recommendation. Specifically, the Court agrees with the Magistrate Judge that IBM did not give serious consideration to offering LTPP, or any other financial assistance program, during the eligibility periods for VTP-1, VTP-2, and VTP/LOA. Simply because a plan similar to LTPP was being developed prior to April 19, 1990 does not necessarily mean that IBM was seriously

considering offering the plan to its employees at the Lexington facility. The Court rejects the plaintiffs' argument that the Magistrate Judge improperly hinged serious consideration on IBM's negotiations with Clayton & Dubilier. Although the Magistrate Judge determined that IBM did not seriously consider offering LTPP until the date Clayton & Dubilier offered to purchase the Lexington facility, the Magistrate Judge did not base this holding on any meeting of the minds between IBM and Clayton & Dubilier; rather, it was IBM's decision alone to seriously consider offering LTPP to its Lexington employees which was determinative. Moreover, the Magistrate Judge correctly set out the underlying facts and considered each fact in determining that IBM did not begin to seriously consider offering LTPP until April 19, 1990. Finally, the Court rejects the plaintiffs' argument that the Magistrate Judge's finding that IBM did not seriously consider offering LTPP to its Lexington employees until April 19, 1990 is clearly erroneous. The record indicates that although a plan similar to LTPP existed or was developed in 1989, IBM did not begin to seriously consider implementing LTPP, or any other financial assistance program, until April 1990. As there is no genuine issue of material fact for trial, the Court adopts the Magistrate Judge's recommendation.

Accordingly, the Court hereby ORDERS:

(1) the objections of the plaintiffs to the Magistrate Judge's report and recommendation [docket entry 198] are OVERRULED;

(2) the Magistrate Judge's report and recommendation [docket entry 197] is ADOPTED as and for the opinion of the Court;

(3) the plaintiffs' motions for summary judgment [docket entries 155 & 179] are DENIED;

(4) IBM's motion for summary judgment [docket entry 158] is GRANTED;

(5) IBM's motion for oral argument on the motion for summary judgment [docket entry 159] is DENIED; and

(6) a judgment will be entered contemporaneously with this opinion and order in favor of the defendants.

This 5th day of September, 1995.

/s/ Karl S. Forester
KARL S. FORESTER
Judge

[Filed Sep. 5, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 91-122

RICHARD R. MUSE, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants.

JUDGMENT

In accordance with the opinion and order entered contemporaneously with this judgment, the Court hereby ORDERS AND ADJUDGES:

(1) the complaint is DISMISSED WITH PREJUDICE, and judment is entered in favor of the defendants;

(2) this judgment is final and appealable, and no just cause for delay exists; and

(3) this matter is STRICKEN from the active docket.

This 5th day of September, 1995.

/s/ Karl S. Forester
KARL S. FORESTER
Judge

APPENDIX C

[Filed July 28, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 91-122

RICHARD R. MUSE, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants.

PROPOSED FINDINGS OF FACT AND RECOMMENDATION

I

The plaintiffs, by counsel, have filed a Motion for Summary Judgment, (DE 155, 189), to which the defendants, by counsel, have responded. (DE 183). The defendants, by counsel, have filed a Motion for Summary Judgment, (DE 158, 190, 194), to which the plaintiffs, by counsel, have responded. (DE 181, 193, 196). The Court has referred this action to the Magistrate Judge for consideration and recommendation pursuant to 28 U.S.C. Section 636(b). (DE 15).

II

The plaintiffs are former employees of the defendant, International Business Machines Corporation (IBM),[1]

[1] The other named defendants in this action are the plan administrators of the various early retirement programs offered to the

who retired pursuant to one of three early retirement programs offered by IBM from September 28, 1989, until March 31, 1990. All of the plaintiffs were employed at IBM's site in Lexington, Kentucky. The purpose for offering the programs was to reduce the number of persons employed by IBM at the Lexington site as well as other sites throughout the United States.

The first program, which was nominated as Voluntary Transition Payment Program [hereinafter referred to as VTP-1], was offered on September 28, 1989. This program was offered to employees at IBM's Lexington site as well as three other IBM sites throughout the United States. Eligibility for participation in this program was restricted to specific skill families at these sites, and seniority was to determine who would participate in the program if there was an oversubscription. Pursuant to this program, employees would have to terminate their employment before December 29, 1989, and each would receive one week of salary for every six months of service up to a maximum of fifty-two weeks of salary.

The second program, which was also nominated as Voluntary Transition Payment Program [hereinafter referred to as VTP-2], was offered on December 5, 1989. This program was offered company-wide to employees of IBM, and eligibility for the program was offered to a wider range of skill families than had VTP-1. While this program was also offered to employees at the Lexington site, those who had been eligible for participation in VTP-1, but did not participate in the program, were not eligible for participation in VTP-2. Pursuant to this program, employees would have to terminate their employment after December 31, 1989, but before March 31, 1990. Those accepting the VTP-2 program received the same salary package as those who accepted the VTP-1 program.

IBM employees at its Lexington site from September 28, 1989, until December 31, 1990. (*See* DE 1, 7).

The third program, which was nominated as Voluntary Transition Payment Program/Five-Year Pre-Retirement Leave of Absence [hereinafter referred to as VTP/LOA], was offered company-wide, and all employees who were eligible for participation in either VTP-1 or VTP-2, and who were within five years of retirement eligibility, were eligible to participate in this program. Pursuant to this program, employees would have to assume leave status by March 31, 1990. Those accepting the VTP/LOA program received the same salary package as those who accepted the VTP-1 and VTP-2 programs.[2]

The plaintiffs state that they were aware at the time each of these three programs was offered that other early retirement programs had been offered in the past to IBM employees at other sites throughout the United States. The plaintiffs state that these other programs provided for two weeks of salary for every six months of service up to a maximum salary of 104 weeks along with an additional payment of $25,000. Based on this knowledge, the plaintiffs state that they inquired of IBM supervisors whether any such program would be offered to them in the future. The plaintiffs' allege that the response which they received was "no." Based on this response, the plantiiffs accepted participation in one of the three programs being offered.

Subsequent to the plaintiffs' acceptance of participation in one of the three programs offered to them, IBM offered on August 1, 1990, a program nominated as Lextington Transition Payment Program (LTPP).[3] The purpose of this program was to reduce the work force at the Lexington site to accommodate its sale to a third party. This

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[2] In addition, those participating in the VTP/LOA program received during the five-year period service and earnings credit under the IBM Retirement Plan as well as medical and other benefits.

[3] This program also had a five year pre-retirement leave of absence feature.

program was restricted to certain skill families, and if the program was oversubscribed participation would be determined by seniority. Departure dates under this program were scheduled from September 28, 1990, until December 31, 1990. Employees accepted into this program received two weeks of salary for each six months of service up ot a maximum of 104 weeks of salary along with an additional payment of $25,000.

The plaintiffs argue that, but for the misrepresentations of IBM through its supervisors and literature, they would have continued their employment until the LTPP program was announced, and then retired pursuant to its terms. Obviously, those who retired pursuant to the LTPP program, as opposed to those who retired pursuant to the VTP-1, VTP-2, or VTP/LOA program, received an enhanced retirement package, including twice the salary and an additional $25,000.

The defendants respond that no misrepresentations occurred because of the fact that the purpose of the VTP-1, VTP-2, and VTP/LOA programs was separate and distinct from the purpose of the LTPP program. The defendants state that, on the one hand, the purpose of the VTP-1, VTP-2, and VTP/LOA programs was to reduce IBM's work force at selected sites, and that this decision was a unilateral one based solely on a corporate business decision. The defendants state that, on the other hand, but for the agreement to sell a part of the Lexington site, and the purchaser's request that the work force thereof be reduced, the LTPP program would not have been offered.

The plaintiffs have filed this action pursuant to the provisions of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1001-1461. Under ERISA, IBM owed the plaintiffs certain fiduciary duties with regard to the offering of these early retirement programs. The plaintiffs claim that IBM violated those duties.

In support of its claim, the plaintiffs make two assertions. One, that, during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs, IBM negligently or intentionally misrepresented to the plaintiffs that no further early retirement programs would be offered when, at the time of such misrepresentation, IBM was seriously considering offering the LTPP program, which would provide substantially greater benefits to the plaintiffs than the VTP-1, VTP-2, and VTP/LOA programs. Two, that, during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs, IBM intentionally failed to provide the plaintiffs with information that it was seriously considering offering the LTPP program.

IBM responds that the plaintiffs are without standing to asert their claim because the LTPP program did not come into existence until July 12, 1990, which was well after the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs. IBM further responds that, while it was seriously considering the closure, sale, or downsizing of the Lexington site during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs, and while it was seriously considering different programs to reduce the number of employees at the Lexington site during such eligibility periods, it did not seriously consider offering the LTPP program until June 19, 1990.

III

It is well established, and the parties acknowledge, that "[c]ompany management often wears two hats in the administration of company benefit plans." *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992). The parties further acknowledge that "[e]xisting precedent has recognized the distinction between an employer's prerogative to initiate discretionary policy decisions such as creating, amending, or terminating a particular plan as compared to its fiduciary responsibilities to administer

an existing plan for the benefit and interests of its participant-employees." *Id.* (citations omitted).

The parties, however, disagree as to where, in this action, the distinction between "discretionary policy decisions" on the one hand and "fiduciary responsibilities" on the other hand lies. In making this decision, the court must look to controlling authority in this judicial circuit, which consists of the opinions in *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), and *Drennan v. General Motors Corp., supra.*

A

In *Berlin*, 858 F.2d 1154 (6th Cir. 1988), the plaintiffs were management-level employees with the defendant, Michigan Bell Telephone Company (MBT). MBT realized that, because of financial difficulties it was experiencing, it would have to reduce the number of management-level employees. On October 1, 1980, MBT officially adopted a program known as the Management Income Protection Plan (MIPP) as a means for reducing its number of management-level employees. MIPP was offered from October 1, 1980, to December 1, 1980.

Following December 1, 1980, MBT continued to experience financial problems, and continued to have a surplus of management-level employees. MBT considered again implementing MIPP as a means of reducing the surplus of management-level employees, but the idea was consistently rejected because it was a relatively costly means for reducing the surplus. While again implementing MIPP was consistently rejected, it continued to be an option available to MBT; that is, "MIPP remained effective . . . since (although not always implemented) MIPP was always a viable work force reduction alternative available to the company." *Id.* at 1157.

Also following December 1, 1980, management-level employees, "especially those considering retirement, [inquired] about the possibility of future general MIPP of-

fernigs." *Id.* at 1158. Officials of MBT responded to such inquiry by stating that the MIPP offering of October 1980 would not be offered again, and that management-level employees "considering retirement should not delay plans in anticipation of another MIPP offering." *Id.* Such representations were allegedly made by MBT officials as late as May 18, 1982. Consequently, the plaintiffs retired.

On June 11, 1982, it was decided at an executive meeting of MBT officials that MIPP would again be implemented. Specifically, it was decided that a general MIPP offering would be made to management-level employees retiring between June 1, 1982, and July 31, 1982. The plaintiffs subsequently filed suit claiming violations of ERISA based on MBT's representations that MIPP would not be offered again.

The parties agreed that it was "difficult to determine when MBT concluded that only a second MIPP offering would adequately alleviate the management surplus problem." *Id.* at 1160. The record, however, disclosed the following:

> [T]hat management surplus was discussed throughout the relevant period and that methods were discussed for work force reduction. MIPP was discussed in a number of meetings by MBT officials, and consideration of MIPP by high-level managers commenced as early as March 1982. Written cost-effectiveness studies were also undertaken, one of which was prepared on May 6, 1982, and another was prepared on May 20, 1982.

Id. The record further disclosed that, "[o]n June 1, 1982, a meeting was held at MBT to further design and discuss a MIPP offering, . . . and a recommendation was made that MIPP should be offered again." *Id.* This recommendation was subsequently approved by MBT's chief operating officer and president, and then presented

and approved by MBT's executive group on June 11, 1982. *See id.*

The *Berlin* Court acknowledged the general principle that an employer's decision to offer an ERISA plan is a nonfiduciary business decision, while an employer's decisions regarding the administration of an existing ERISA plan are fiduciary in nature. The court stated that, while MBT's "decision to offer MIPP benefits was a nonfiduciary business decision," it did not agree . . . that any comunications or representations made prior to such a decision were also nonfiduciary." *Id.* at 1163. The court wrote:

> On the contrary, we hold that when serious consideration was given by MBT to implementing MIPP by making a second offering (a question of material fact), then MBT as the plan administrator and/or . . . the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering.

Id. at 1163-64. Finding that the district court had not considered MBT's actions in light of these principles, the court remanded the case for further consideration consistent with its opinion.

B

In *Drennan*, 977 F.2d 246 (6th Cir. 1992), the plaintiffs were laid off employees of General Motors (GM) with ten or more years of seniority. The plaintiffs had been laid off in August, 1987, when GM, because of financial problems it was experiencing, closed its plant in Norwood, Ohio. On September 15, 1987, GM notified the plaintiffs of their right to participate in a benefit plan nominated as Supplemental Unemployment Plan Separation (SUB). This announcement was required by the collective bargaining agreement in effect at the time.

At this same time, GM had in effect another benefit plan, which was nominated as Voluntary Separation of Employment Program (VTEP). VTEP was available to GM employees with ten or more years of seniority, and provided substantially enhanced benefits as compared to those benefits provided by SUB. However, pursuant to the collective bargaining agreement in effect during this time, GM was not required to offer the VTEP to the plaintiffs.

After GM announced the layoff, but before agreeing to participate in SUB, the plaintiffs inquired of GM's Norwood plant management about their right to participate in VTEP, rather than SUB. Norwood plant management consistently denied that VTEP would become available to the plaintiffs. Based on this representation, the plaintiffs' agreed to participate in SUB. Subsequently, on April 12, 1988, GM announced that VTEP was being offered to all GM employees. The plaintiffs were not permitted to participate in VTEP because, by this point, they had all accepted SUB. The plaintiffs subsequently filed suit claiming violations of ERISA based on GM's representations that VTEP would not be made available to them.

"Although the Norwood plant management consistently denied that VTEP would become available to [the plaintiffs], GM management was, in fact, privately considering the option of their participation in VTEP." *Id.* at 248.

> GM's consideration of the Class participation in VTEP was initiated during November, 1986, when the plant closing was announced. Thereafter, during the ensuing months to April 12, 1988, when GM made a VTEP program available to GM employees with more than ten years of seniority upon application, GM management had, in fact, been seriously considering this ultimate action without disclosing the internal progress to those considerations to the Class.

Id. at 249.

"The district court found that GM had been seriously considering offering VTEP, which was superior to the SUB Buyout, to the Class before its members accepted the latter plan as a result of GM's misrepresentations." *Id.* at 250. The district court concluded that "GM had violated its fiduciary duty not to make either intentional or negligent misrepresentations concerning the availability of participation in the preferable VTEP plan." *Id.* The district court "also found that GM had 'misled the employees of the Norwood plant by not disclosing that a VTEP-type plan would be offered or even that the local management was pursuing such a plan.'" *Id.*

The *Drennan* Court, like the *Berlin* Court, began by acknowledging the legal difference between an employer's nonfiduciary, business decision to offer a plan as compared to an employer's fiduciary duties with regard to the administration of an existing plan and its participants. *Id.* at 251. Relying on the reasoning in *Berlin,* the *Drennan* Court wrote that "the duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious consideration to make a plan available to affected employees." *Id.* The court further wrote that "[a] fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations . . . ." *Id.*

In affirming the district court's decision that GM had violated its fiduciary duties, the *Drennan* Court wrote:

> The district court's finding that GM had a VTEP-type plan for laidoff Norwood employees under "serious consideration" while it was conducting various management-Class meetings during September of 1987 is well-supported by the record. Not only was Class participation in VTEP under serious consideration during that time frame, but each rejection of the plan stimulated renewed interest and further manage-

ment explorations to make it available to the Class participants.

Id. at 246-47. The court pointed out that "it was GM's serious consideration of the plan . . . that triggered its fiduciary duties," and that "GM was impressed with a fiduciary duty to keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan." *Id.* at 252.

C

Based on language in *Berlin* and *Drennan*, as well as language in *Swinney v. General Motors Corp.*, 46 F.3d 512 (6th Cir. 1995), the Magistrate Judge finds that, whether LTPP is termed an "existing" plan and "amendment" to an existing plan, or a "prospective" plan is immaterial. *See Drennan*, 977 F.2d at 251; *Swinney*, 46 F.3d at 521 n.4. Rather, based on *Berlin* and *Drennan*, as well as *Swinney*, the Magistrate Judge finds the initial inquiry to be whether, during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs (i.e. September 28, 1989, to March 31, 1990), IBM gave "serious consideration" to offering LTPP to the employees at its Lexington site. The Magistrate Judge addresses this issue below.

D

During the years 1988 through 1990, IBM was attempting to reduce its expenses by reducing its employees. IBM, however, maintained a policy of not laying off employees, and, therefore, began offering early retirement programs. Initially, these programs were limited to employees at specific IBM facilities, but by late 1989 and early 1990 IBM began offering such programs to employees at all of its facilities.

As early as March 1989, IBM was considering the sale, downsizing, or closure of its Lexington facility, and had

recognized the need to reduce the number of employees at the Lexington facility in either event. On September 28, 1989, IBM offered VTP-1 to employees at its Lexington facility. IBM knew before offering VTP-1 that such program would not sufficiently reduce the number of employees at its Lexington facility. Consequently, IBM continued to consider the sale, downsizing, or closure of its Lexington facility, as well as various means by which it could further reduce the number of employees at its Lexington facility. At least by November 1989, one of the various means mentioned by IBM officials for reducing the number of employees at the Lexington facility was an early retirement program offering two times separation pay plus $25,000.00; that is, a program which would offer benefits similar to those ultimately offered by LTPP.

By the first of December 1989, however, IBM had decided that its Lexington facility would not be closed, and that a purchaser would be sought. IBM still was concerned with reducing the number of employees at its Lexington facility, and on December 5, 1989, offered VTP-2 to the employees at its Lexington facility. Apparently still concerned with reducing the number of employees at it Lexington facility, IBM, on January 22, 1990, offered VTP/LOA to employees at its Lexington facility.

By the end of January 1990, IBM had begun seriously considering the sale of its Lexington facility. In fact, on January 24, 1990, IBM's management committee gave authority to company officials to proceed toward a possible sale of its Lexington facility.

In late February or early March 1990, IBM officials had their initial contact with Clayton & Dubilier, the company which ultimately purchased its Lexington facility. During the last week of March 1990, IBM officials had an introductory meeting in New York with Clayton & Dubilier. On April 19, 1990, Clayton & Dubilier made a presentation to IBM officials at its Lexington facility

regarding its interest in purchasing the Lexington facility. Negotiations then began between IBM and Clayton & Dubilier, and it was understood by both sides that the number of employees at the Lexington facility would have to be further reduced in order to successfully negotiate a sale.

Consequently, in late April 1990, IBM officials began considering how it could reduce the number of employees at its Lexington facility so that it could successfully negotiate a sale of its Lexington facility to Clayton & Dubilier. One means discussed by IBM officials was an early retirement program providing benefits of two times separation pay plus $25,000.00; that is, IBM began discussing what was to become known as LTPP. Other means being discussed by IBM officials beginning in late April 1990 were two times salary plus $2,500.00, three times separation pay, and two times separation pay plus $20,000.00. These discussions continued through May and into June 1990.

On June 19, 1990, an IBM task force decided that it would recommend to IBM's mnagement committee that the LTPP be offered to employees at IBM's Lexington facility. The task force decided to further recommend that LTPP not be retroactive to employees at the Lexington facility who had accepted one of the VTP programs. The IBM management committee adopted the task force's recommendation regarding LTPP on July 12, 1995, and on August 1, 1990, LTPP was announced and offered to employees at IBM's Lexington facility.

Based on these facts, the Magistrate Judge finds that no reasonable trier of fact could conclude that IBM gave "serious consideration" to offering LTPP to employees at its Lexington facility until April 19, 1990. The fact that IBM was seriously considering other benefit plans at this same time, and that IBM did not actually decide to offer LTPP until July 12, 1990, does not dictate a finding that serious consideration of offering LTPP oc-

cured at a date after April 19, 1990. *See Berlin*, 858 F.2d at 1159-60. It was at this point in time (i.e., April 19, 1990) that IBM began seriously considering offering LTPP to employees at its Lexington facility, and, therefore, it was at this point that its duties under ERISA with regard to such consideration commenced.

Similarly, but on the other end of the spectrum, the fact that a benefit plan offering two times separation pay plus $25,000.00 had been mentioned by at least one or more IBM officials beginning back in November, 1989, does not dictate a finding that serious consideration of offering LTPP occurred at a date before April 19, 1990. Unlike the VTP programs, which were offered to generally reduce the number of IBM's employees company-wide, including its Lexington facility, LTPP was a costly undertaking specifically offered by IBM to reduce the number of employees at its Lexington facility so that it could hopefully negotiate a sale of that facility to Clayton & Dubilier. The Magistrate Judge finds no evidence that, prior to Clayton & Dubilier's offer, IBM was *seriously considering* offering or implementing such a costly undertaking as a means by which to generally reduce the number of employees at its Lexington facility specifically, or all of its facilities generally. In other words, had Clayton & Dubilier not expressed an interest in purchasing IBM's Lexington facility, the Magistrate Judge finds no evidence on which a reasonable trier of fact could conclude that IBM, in its continuing concern and effort to reduce the number of its employees company-wide, would have offered LTPP to any of its employees, whether they be at its Lexington facility or any of its other facilities.

As IBM was not seriously considering offering LTPP to employees at its Lexington facility until April 19, 1990, which is a date outside the eligibility periods for the VTP-1, VTP-2, and VTP/LOA programs, IBM had no duty towards the plaintiffs with regard to the offering of LTPP. *See Berlin*, 858 F.2d at 1164; *Drennan*, 977

F.2d at 252 ("[I]t was GM's serious consideration of the plan . . . that triggered its fiduciary duties"). Therefore, the plaintiffs' allegations that IBM, through its officials, supervisors, and literature, made misrepresentations between September 28, 1989, and March 31, 1990, regarding the future availability of LTPP are immaterial. IBM's Motion for Summary Judgment should be granted, and the plaintiffs' Motion for Summary Judgment should be denied.

IV

For the reasons stated,

IT IS RECOMMENDED that the plaintiffs' Motion for Summary Judgment, (DE 155), be DENIED, and that the defendants' Motion for Summary Judgment, (DE 158), be GRANTED.

The Clerk of the Court shall forward a copy of this Proposed Findings Of Fact And Recommendation to the respective parties who shall, within ten (10) days of receipt thereof, serve and file timely written objections to the Magistrate Judge's Proposed Findings Of Fact And Recommendation with the District Court or else waive the right to raise the objections in the Court of Appeals. 28 U.S.C. section 636(b)(1)(B); *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *affimed*, 474 U.S. 140 (1985); *Wright v. Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Fed.R.Civ.P. 72(b).

This the 28th day of July, 1995.

/s/ James B. Todd
JAMES B. TODD
U.S. Magistrate Judge

Date of Entry and Distribution:

APPENDIX D

STATUTORY PROVISIONS

29 U.S.C. § 1001. Congressional findings and declaration of policy

* * * *

(b) **Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries.** It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with

such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

* * * *

APPENDIX E

PERSONAL & CONFIDENTIAL

IBM Vice President and
AGM,
Market Development
US Marketing & Services
72/3WY, Valhalla, NY
(914) 749-3100; T/L
777-3100
PROFS ID: RHQVM01/
RCLARK
DEPT. ID: RHQVM01/
JVURA
June 14, 1990

MEMORANDUM TO: Mr. W. J. Colucci

SUBJECT: Incentive Program In Lexington

Bill, as we discussed a week ago, I am *very* concerned about the backlash in Boulder relative to the proposed incentive program in Lexington.

I am convinced that of the 700 or so people who either moved or took the VTP, most of them would feel cheated and mistreated if the Lexington program is implemented as planned.

While I understand the difference in the size of the problem and the nature of the business transaction, each individual in Boulder looks at it as the same situation that they faced:

—My job is no longer needed.

—I must either leave the company or move to an unfavorable location.

—If so, why should I have VTP and someone in Lexington have 2X or more. They will remember

> that they were told: We're not going to do what we did in Tucson or Boca anymore—"it's too expensive. The VTP is as good as it's going to get."

Given this, I believe we will have *hundreds* of people who will open door or speak up and have *some* level of a publicity problem with which to deal. (No one has suggested a legal or IR threat of a convincing nature.)

In addition, after a long period of working the expectation down to a point where people believe VTP is "as good as it's going to get," we'll have a long road to reestablish that again. This was the key to our level of success with VTP this year.

The only answer I have for Lexington is—do it the way we did in Boulder. A sweet deal will have a high price on our people's trust and confidence in IBM and will clearly raise the price of future downsizing.

/s/ R. W. Clark
R. W. CLARK

/mi

cc: Mr. G. R. Conrades
Mr. N. C. Lautenbach
Mr. T. R. Lautenbach

No. 96-1520

Supreme Court, U.S.
FILED
APR 1 1997
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD R. MUSE, *et al.*,
Individually and on behalf of Others Similarly Situated,
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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---

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

This Supplement addresses matters set forth in Reasons II and III of the Petition for Writ of Certiorari, at 16-22, and is necessitated by the March 21, 1997 decision of the Second Circuit in *Ballone v. Eastman Kodak Co.*, —— F.2d ——, 1997 U.S. App. LEXIS 5430 (2nd Cir. 1997) [Appendix at 1a].* *Ballone* underscores just how far afield the Sixth Circuit is from the decisions of this

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* The decision in *Ballone* was not accessible through LEXIS ® until March 25, 1997, the date on which the within Petition was filed. Accordingly, it was not available at the time of Petitioners' last filing, but it may affect this Court's consideration of the case.

Court. The case under review, *Muse v. IBM*, 103 F.3d 490 (6th Cir. 1996) [Petition Appendix at 1a], is in direct and irreconcilable conflict with *Ballone* and this conflict further illustrates the growing confusion which exists in the lower federal courts regarding the scope of an employer's fiduciary duty to communicate truthfully with employees regarding voluntary severance plans covered by ERISA. Because the use of such a plan is widespread and frequently is the key component of corporate downsizing efforts, it is of continuing importance to both employers and employees that this Court address the questions presented in *Muse* and clarify this significant area of ERISA law.

Mirroring the approach of the district court and Sixth Circuit in *Muse*, the district court in *Ballone* limited its deliberation (through a bench trial) to a single question —whether the employer was "seriously considering" implementing an enhanced plan at the time it made the alleged misrepresentations. As in *Muse*, "[b]ecause the district court believed that the lack of serious consideration of [that plan] by Kodak made any alleged misrepresentations immaterial, it did not examine any of the misrepresentations in detail." [Appendix at 6a]. The questions posed in *Ballone* are straightforward:

> We first address the district court's conclusion that "serious consideration" of a plan change is a prerequisite to materiality, where a plan fiduciary makes alleged misrepresentations to ERISA plan beneficiaries leading them to believe that future plan changes have been ruled out. We hold that it is not. We next address the court's conclusion that absent serious consideration of plan changes, no statement about future plan benefits can be misleading. We disagree with the district court's conclusion on this point as well.

Id. at 7a.

Relying principally upon *Varity Corp. v. Howe*, 516 U.S. ——, 134 L.Ed.2d 130, 116 S.Ct. 1065 (1996)

the crux of the Second Circuit holding is captured in the following:

> Applying these trust-law principles, it is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, *regardless of whether or not it is seriously considering future plan changes.* Kodak has a duty to deal fairly and honestly with its beneficiaries.

Id. at 10a. (emphasis added).

The contrast and conflict between the holdings in *Ballone* and *Muse* is stark and overwhelming:

> Any misrepresentation IBM made to the plaintiffs after it gave serious consideration to the implementation of an enhanced incentive plan could constitute a breach of its fiduciary duty under ERISA. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). *However, misrepresentations made before serious consideration trigger no such duty.*

Muse, Petition Appendix at 6a. (emphasis added).

Muse thus holds that serious consideration of a particular plan for a particular purpose is the singular factor that must be found to exist under any and all circumstances. Until that date is established, the duty to avoid material misrepresentations does not exist and the trier of fact has no obligation to determine whether there were any misrepresentations and, if so, whether they were material. Under *Muse*, an employer/fiduciary may lie to plan participants about the availability of a future plan with impunity at any time before the serious consideration date has been reached. *Ballone* directly challenges that rationale:

> [Although] Kodak need not be prescient, an employer does not enjoy carte blanche to make statements that the employer knows to be false, or that have no

> reasonable basis in fact, simply because the statements concern the future.

Appendix at 15a.

In its application and interpretation of the *Varity Corp.* principle, *Ballone* rejects the *Muse* holding that a finding of serious consideration is mandated before the fiduciary duty to avoid material misrepresentation arises. Similarly, in its explanation of *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2nd Cir. 1994), and its application and interpretation of the materiality standard set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), *Ballone* rejects the *Muse* holding that a single fact or occurrence [whether it be "serious consideration" or "a particular plan for a particular purpose"] always will be determinative of and precede the inherently fact-specific finding of materiality. *Ballone* also confirms that misrepresentations are material if they would induce a reasonable employee to rely upon them. [Appendix at 7a]. *See*, Petition at 18.

In sum, *Ballone* is the embodiment of the conflict between *Muse* and *Varity Corp.* and *Basic*. In its own right, *Ballone* represents yet another example of the ongoing conflict among Circuits, now expressed in terms of whether serious consideration is a prerequisite to a finding of material misrepresentation and the attendant ERISA fiduciary duty or whether it is nothing more than one of several factors to be examined in the context of materiality of false assurances. [Appendix at 12a]. However phrased, the conflict continues and only this Court's review and resolution can bring certainty and closure to the issues raised herein.

CONCLUSION

The Petition for a Writ of Certiorari, as supplemented, should be granted.

Respectfully submitted,

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* *Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 96-7209, 96-7212

JOSEPH L. BALLONE, *et al.*,
Plaintiffs-Appellants,

v.

EASTMAN KODAK CO., *et al.*,
Defendants-Appellees.

November 6, 1996, Argued
March 21, 1997, Decided

Before: FEINBERG, LEVAL and PARKER, Circuit Judges.

OPINION

PARKER, Circuit Judge:

In this case, we are called upon to determine the circumstances in which alleged misrepresentations made by an employer to retirement plan beneficiaries about future plan amendments are actionable under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a), which imposes a fiduciary duty on retirement plan administrators. Plaintiffs, all former employees of Eastman Kodak Company who retired between January 1 and July 1, 1991, contend that Kodak made affirmative misrepresentations that led them to believe that no enhanced pension plan would be forthcoming in the months following their retirement. Shortly after Plaintiffs retired, Kodak implemented a pension plan with benefits exceeding those of Plaintiffs' retirement plan. Plaintiffs there-

after brought suit in the United States District Court for the Western District of New York, alleging, among other things, that Kodak breached its fiduciary duty under ERISA. The district court (Michael A. Telesca, Judge) granted judgment to Kodak on Plaintiffs' claims under § 1104(a), and other related claims, concluding that because Kodak had not "seriously considered" changes to the retirement plan before Plaintiffs retired, Kodak's statements about future plan changes were neither material nor misleading. We conclude that because Kodak allegedly assured Plaintiffs that it had ruled out plan changes for the immediate future, when in fact it had not, the district court erred in determining that the absence of "serious consideration" of plan changes warranted judgment in Kodak's favor. Accordingly, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. Kodak's Consideration of Retirement Plan Amendments

As the district court found, throughout the 1980s, Kodak had been downsizing to cut costs. The company generally achieved its downsizing goals by offering special voluntary separation programs, known as Limited Separation Enhancements ("LSEs"), which offered severance pay and retraining allowances to targeted employees. Kodak provided these severance packages through its Termination Allowance Plan ("TAP"), which provided up to seventy-eight weeks severance pay depending on the employee's length of service. This program was distinct from Kodak's pension plan, the Kodak Retirement Income Plan ("KRIP").

In 1990, Kodak revised KRIP to eliminate the minimum age requirement for retirement and to provide partial or full pension benefits depending on the employee's age and length of service. Although the district court determined

that the amendments were only intended to make the program more competitive in the industry and to respond to tax concerns, it is undisputed that KRIP induced more employees to retire and was therefore helpful to Kodak's downsizing efforts. Accordingly, after Kodak enhanced KRIP, the company essentially eliminated LSE and reduced severance pay under TAP to fifty-two weeks.

The district court found that in 1990 Kodak considered KRIP sufficiently generous that no amendments to the plan would be needed in the future. In the spring of 1991, however, Kodak formed a "downsizing task force" to evaluate and improve upon Kodak's past downsizing process. This included review of its pension and separation plans and review of the criteria used to target employees during downsizing. During this time, the company's earnings decreased eleven percent from fiscal 1990, and its costs increased twenty percent.

In June of 1991, in response to the worsening economic condition of the company, Kodak instructed the heads of the Electronic Imaging Organization ("EIO") and the Commercial Imaging Group ("CIG") to seeks ways to cut costs. The company did not specifically instruct them to target employees for downsizing. In July, the heads of the two divisions began to explore downsizing options. The district court found that Kodak discussed many scenarios but developed no specific plan. On July 19, 1991, the benefits manager at Kodak convened a conference call of all division managers regarding various issues relating to the downsizing, but the agenda for the call noted that the need for downsizing had not yet been confirmed.

In mid-July, Kodak's second-quarter earnings statement became available. The statement indicated that Kodak's operating goals were not being met and that Kodak's financial condition had deteriorated further. Accordingly, Kay Whitmore, the chief executive officer and chairman of the board of Kodak, instructed Kodak offi-

cials to consider various downsizing scenarios, preferring a voluntary discharge program funded by KRIP assets. He stated that Kodak needed to have a plan in place by mid-August.

The district court found that Whitmore's downsizing mandate was galvanized during a July 22, 1991, meeting between John McCarthy, senior vice-president of Kodak and president of Human Resources, and personnel relations directors of Kodak's various business groups. At the meeting, it became clear that the downsizing would extend beyond EIO and CGI to all of the company. On July 25, McCarthy informed the personnel relations directors that a voluntary downsizing program would be implemented, but it was still unclear which divisions would be targeted. Based on McCarthy's statements at the July 25 meeting, the district court concluded that as of July 25, 1991, Kodak's new retirement plan, the Resource Redeployment and Retirement Program ("RRRP"), was under "serious consideration" by Kodak.

After management meetings on July 28-30, Whitmore concluded that Kodak would have to sever 3000 employees. To this end, he instructed McCarthy to prepare a plan by August 2. It was to be a voluntary severance plan funded out of KRIP assets. The outline of the plan was established by August 2. The Board approved the plan on August 9. On August 12, Kodak announced it to the public. The plan, RRRP, provided full pension benefits to employees with seventy-five points (calculated based on the employee's age plus years in the company), plus fifty-two weeks severance pay, a social security bridge payment, and a $5000 retraining allowance. The severance pay, bridge payment, and retraining allowance were not available to Plaintiffs, who retired under KRIP, the plan RRRP replaced.

B. Alleged Misrepresentations

Plaintiffs allege that during the time Kodak considered downsizing scenarios in 1991 it falsely assured them that no changes to its retirement plan were forthcoming. They allege that Kodak assured them that it would implement no retirement plan enhancements during 1991, that KRIP was a permanent plan for the future and that downsizing would not occur before at least 1992. Kodak allegedly told Plaintiffs that the 1990 KRIP plan would not change in the near future for various specific reasons, including the cost of such an enhanced program, government regulations, and the lack of any immediate need for a future enhanced benefits program. Plaintiffs claim that they left the company shortly before the RRRP benefits became available in August, in reliance on Kodak's statements.

C. Proceedings Below

The district court held a bench trial limited to the question of whether Kodak "seriously considered" implementing RRRP at the time it made the alleged misrepresentations. Because the district court found that Kodak did not seriously consider implementing RRRP until July 25, 1991, it held that none of the alleged misstatements made before that date were material.

In limiting the scope of its materiality analysis to the serious consideration issue, the district court relied on *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994) (Feinberg, J.), where this Court noted that the more seriously an ERISA plan change is being considered, the more material the misrepresentations become. See *id.* at 669. The district court interpreted Mullins to stand for the bright-line rule that, "at a minimum, pension plan changes must be under 'serious consideration' before a plan administrator can be held liable for making material misrepresentations about the plan to participants or beneficiaries."

Because the district court believed that the lack of serious consideration of RRRP by Kodak made any alleged misrepresentations immaterial, it did not examine any of the misrepresentations in detail. The court concluded, however, that because Kodak was not seriously considering future changes until July 25, 1991, any statements to Kodak employees made before that date telling them that Kodak had decided not to change the plan were not deceptive. The court also determined that the statements could not have been deceptive in light of a newsletter that Kodak distributed informing employees that Kodak's retirement plan could change.

For the foregoing reasons, the court determined that Kodak did not breach its fiduciary duty under ERISA, 29 U.S.C. § 1104(a). On substantially the same grounds, the court denied Plaintiffs' claims that Kodak illegally discriminated against them in the effort to defeat their entitlement to plan benefits, in violation of ERISA, 29 U.S.C. § 1140. The district court also granted judgment for Kodak on Plaintiffs' common-law estoppel claims. This appeal followed.

II. DISCUSSION

ERISA imposes a fiduciary duty on employers with retirement plans to act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a).[1] We

[1] Subsection (a) of the statute provides, in relevant part:

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man

held in Mullins v. Pfizer that a plan administrator may not make affirmative material misrepresentations about proposed future changes to an employee benefit plan. See 23 F.3d at 669. Such misrepresentations are actionable as a breach of fiduciary duty under ERISA. See *id.*; see also *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996). Here, we consider the contours of that holding. We first address the district court's conclusion that "serious consideration" of a plan change is a prerequisite to materiality, where a plan fiduciary makes alleged misrepresentations to ERISA plan beneficiaries leading them to believe that future plan changes have been ruled out. We hold that it is not. We next address the court's conclusion that absent serious consideration of plan changes, no statements about future plan benefits can be misleading. We disagree with the district court's conclusion on this point as well.

A. Materiality

In ruling that Kodak's alleged misrepresentations were immaterial, the district court erred in attributing talismanic significance to its finding that Kodak's future retirement plan, RRRP, was not under serious consideration at that time Kodak allegedly misled Plaintiffs. Where an ERISA fiduciary makes guarantees regarding future benefits that misrepresent present facts, the misrepresentations are material if they would induce a reasonable person to rely upon them. See *Mullins*, 23 F.3d at 669; see also *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136, 140 (3d Cir. 1993) (Feinberg, J., sitting by designation) ("The ultimate inquiry is whether there is a 'substantial likelihood' that the affirmative misrepresentation 'would mis-

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acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and like aims . . . .

29 U.S.C. § 1104(a)(1)(A)-(B).

lead a reasonable employee in making an adequately informed decision about if and when to retire.' " (quoting *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) (Feinberg, J., sitting by designation))). Whether a plan is under serious consideration is but one factor in the materiality inquiry. See *Mullins* 23 F.3d at 669; *Kurz*, 994 F.2d at 140.

Contrary to the district court's interpretation, Mullins did not establish a bright-line rule that serious consideration of a future plan is a prerequisite to liability for misstatements regarding the availability of future pension benefits. There we stated only that if a misrepresentation is found, "whether a plan is under 'serious consideration' at the time a misrepresentation is made is relevant to materiality." 23 F.3d at 669 (emphasis added). " 'The more seriously a plan change is being considered, the more likely a misrepresentation . . . will pass the threshold of materiality.' " *Id.* (quoting *Fischer*, 994 F.2d at 135).

The district court found support for its interpretation of Mullins in *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988). In Mullins we cited Berlin with approval for the proposition that an employer "need not be perfectly prescient as to all future changes in employee benefits." *Mullins*, 23 F.3d at 668 (citing *Berlin*, 858 F.2d at 1164). We also cited Berlin in support of the proposition that whether a plan is under serious consideration at the time a misrepresentation is made is relevant to materiality. See *id.* at 668. We did not, however, hold that future changes must be under serious consideration before an employer may be liable for affirmative misstatements regarding those changes. *Mullins*, 23 F.3d at 669. Rather, we adopted the simple view that " 'when a plan administrator speaks, it must speak truthfully,' " regardless of how seriously any changes are being considered. *Id.* (quoting *Fischer*, 994 F.2d at 135).

In establishing a rule that there can be no material misrepresentation about a pension plan not yet under

"serious consideration," the district court relied on language in Berlin that we did not endorse in Mullins. After holding that an employer has a fiduciary duty not to misrepresent the possible future availability of a plan under discussion, the court in Berlin went on to "point out that in the case of an unfunded plan . . . there can be no misrepresentations about a future offering until that point in time (a question of material fact) when serious consideration has been given" to the plan. *Berlin*, 858 F.2d at 1164. The district court drew upon this dictum for its bright-line rule. Under Mullins, however, an employer's serious consideration of changes to a plan is but one aspect of the materiality of the alleged misrepresentations, not a prerequisite to the fiduciary's duty to speak truthfully when making disclosures to plan beneficiaries. See 23 F.3d at 669.

Our conclusion in Mullins that a plan administrator has a fiduciary duty not to make material misrepresentations regarding the availability of future plan benefits is squarely in accord with the Supreme Court's recent decision in *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996). Although Varity did not address the materiality of an employer's misstatements, it established that the scope of the employer's fiduciary duty under ERISA is broad. See 116 S. Ct. at 1073-75. The Court considered a case where the employer made misrepresentations about the security of its employees' non-pension benefits to induce them to transfer to a division of the company that the employer had created as a dumping ground for its failing businesses. See 116 S. Ct. at 1068-69, 1071-72. The employees eventually lost their benefits when the division went into receivership. See *id.* at 1069. The Court held that "to participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense[] is not to act 'solely in the interest of the participants and beneficiaries,' " as ERISA requires. *Id.* at 1074.

In Varity, the Court applied "common-law trust standards 'bearing in mind the special nature and purpose of employee benefit plans.' " *Id.* at 1075 (citation omitted). The Court could find "no adequate basis . . . , in the statute or otherwise, for any special interpretation that might insulate [the employer], acting as a fiduciary, from the legal consequences of the kind of conduct (intentional misrepresentation) that often creates liability even among strangers." *Id.* The employer's misrepresentations included "repeated reassurances that benefits would remain 'unchanged,' [a] detailed comparison of [the old and new] benefits, and . . . assurances about [the new subsidiary's] 'bright' financial future." *Id.* at 1074. The employer made these assurances about the employees' future benefits knowing perfectly well that the new division would likely fail. *Id.* at 1068-69.

Applying these trust-law principles, it is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes. Kodak has a duty to deal fairly and honestly with its beneficiaries. See *id.* at 1074-75; cf. In re Unisys Corp. Retiree Med. Benefit "ERISA" *Litig.*, 57 F.3d 1255, 1266-67 (3d Cir. 1995) ("The district court's findings that the company actively misinformed its employees by affirmatively representing to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true and that employees were making important retirement decisions relying upon this information, clearly support a claim for breach of fiduciary duty under ERISA."), cert. denied, 116 S. Ct. 1316 (1996).

If an employer allegedly makes false assurances about future benefits, the materiality of the misstatements turns primarily on the nature and the context of the assurance. Whether consideration is being given to altering a pen-

sion plan at the time the misrepresentation is made is relevant to materiality, for the reasons we stated in Mullins, but it is not a prerequisite. Regardless whether the employer is seriously considering altering its retirement plan, the employer's false assurance that future enhancements have been ruled out for some specific period can be decisive in inducing an employee to hasten retirement, rather than delay in the hope of receiving enhanced future benefits. This aspect of the assurance can render it material regardless of whether future changes are under consideration at the time the misstatement is made.

This conclusion follows from the breadth of an ERISA fiduciary's trust obligations under Varity and the nature of the materiality inquiry under Mullins. It is also consistent with precedent under the securities laws relating to affirmative misrepresentations, to which we looked in Mullins for guidance in crafting ERISA materiality rules. See *Mullins*, 23 F.3d at 669 n.4 (stating that materiality analysis under ERISA is analogous to the test under the securities laws (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 238 (1988)). Under the securities laws, an assurance about the future that by necessary implication misrepresents present facts is clearly actionable. See *ZVI Trading Corp. Employees' Money Purchase Plan and Trust v. Ross (In re Time Warner Inc. Sec. Litig.)*, 9 F.3d 259, 266 (2d Cir. 1993) (assurances may be actionable if made without a basis in fact (citing *Virginia Bankshares, Inc. v Sandberg*, 501 U.S. 1083, 1093 (1991); *Goldman v. Belden*, 754 F.2d 1059, 1068-69 (2d Cir. 1985))). Such statements are material if they would induce reasonable reliance. See *Sandberg*, 501 U.S. at 1090.[2]

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[2] We note the difference between the duty of full disclosure under the securities laws and the disclosure obligations imposed on employers under ERISA. We refer here to securities law precedent only insofar as it is relevant to determining the materiality of affirmative misrepresentations. See *Pocchia*, 81 F.3d at 278 ("Insisting on voluntary disclosure during the formulation of a

Determining the materiality of false assurances like those here alleged is fact-specific and will turn on a number of factors, including: how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes, see *Mullins*, 23 F.3d at 669; the special relationship of trust and confidence between the plan fiduciary and beneficiary, see *Varity*, 116 S. Ct. at 1075; whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee and the employee's reliance on the plan administrator for truthful information, see *In re Unisys Corp.*, 57 F.3d at 1263-64; and the specificity of the assurance, cf. *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993) (outling analogous factors courts consider under the securities laws).[3] Whereas mere mispredictions are not actionable, see *Mullins*, 23 F.3d at 668, false statements about future benefits may be material if couched as a guarantee, especially where, as alleged here, the guarantee is supported by specific statements of fact. Cf. *Malone v. Microdyne Corp.*, 26 F.3d 471, 479 (4th Cir. 1994) (misleading prognostica-

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plan and prior to its adoption would, we think, increase the likelihood of confusion on the part of beneficiaries and, at the same time, unduly burden management, which would be faced with uncertainty as to what to disclose and when to disclose it.").

[3] In determining justifiable reliance under Rule 10-b of the securities laws, we noted in Brown that courts have been guided by the following factors:

> (1) The sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of longstanding business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) . . .; and (8) the generality or specificity of the misrepresentations.

991 F.2d at 1032.

tions may be material under the securities laws if they are "supported by specific statements of fact or are worded as guarantees").

A guarantee implies that current facts support it—in this case, that Kodak had made a decision not to implement plan changes in the immediate future for various specific reasons—and if the guarantee necessarily misrepresents such facts it may be materially misleading. Of course, the guarantee must be realistic. In most circumstances, an employee probably cannot rely upon a representation that the employer has decided never to alter its benefits package, for example, because such a statement is too speculative and unbelievable to "mislead a reasonable employee in making an adequately informed decision about if and when to retire." See *Mullins*, 23 F.3d at 669 (internal quotation omitted).

Based on these standards, it is far from clear that Kodak's alleged misrepresentations were not material. Plaintiffs contend that Kodak told them that it definitely would not implement a new retirement program in the near future. If Kodak had not actually made such a decision, this could be a material misrepresentation since Plaintiffs also allege that they would have delayed retiring if they had known that no such decision had been made. Plaintiffs further allege that Kodak supported these false assurances with various other statements of fact, including the representation that financial considerations precluded the need for a plan for at least another two years and that government regulations prohibited any amendments to the plan. The district court should consider each of the alleged misrepresentations in light of the framework outlined here, to determine if reliance on them was reasonable. "Serious consideration" of plan changes is not the sine qua non of materiality.

B. Misrepresentation

The district court determined that Kodak's statements to the effect that "no pension enhancements were forthcoming" were truthful because, at the time Kodak made the statements, it was not seriously considering enhanced future benefits. We disagree. The district court did not examine any of the statements in detail, and therefore failed to consider Plaintiffs' allegations that Kodak stated that it had reached a decision not to amend its pension plan when in fact it had not made such a decision.

In ruling that Kodak's statements were truthful when made, the district court again relied on Mullins, in this instance for the proposition that, absent serious consideration of plan changes, no statement regarding future plan benefits can be misleading. In Mullins, however, we held only that a company's policy of denying rumors that it was considering an enhanced lump-sum severance package, when the plan was "under consideration," made the misrepresentation question one for the trier of fact. See 23 F.3d at 669. We did not state that serious consideration of future benefits is necessary before such statements can be misleading. The district court also relied on *Wilson v. Southwestern Bell Tel Co.*, 55 F.3d 399, 405 (8th Cir. 1995), for the proposition that "the statements cannot be considered misrepresentations absent evidence that [the corporation] was seriously considering additional plans in the future." Wilson, however, explicitly noted that the employer did not tell its employees that a decision not to offer future benefits had been made. See 55 F.3d at 405 n.4. Plaintiffs allege that Kodak made such statements here.

Plaintiffs allege that Kodak gave them definite assurances that no new benefits would be forthcoming when it knew that plan changes might well be made in the near future. They also allege that Kodak made various false statements of fact to support the assurances. If these alle-

gations are true, a question which the district court did not address, the statements may well have been misleading. While it is correct, as the district court ruled, that Kodak need not be prescient, an employer does not enjoy carte blanche to make statements that the employer knows to be false, or that have no reasonable basis in fact, simply because the statements concern the future. See *Mullins*, 23 F.3d at 669.

Our conclusion is not altered by evidence of a September 6, 1990, issue of the "Kodakery," Kodak's employee newsletter, which informed employees that changing economic conditions could result in further amendment to Kodak's retirement plan. The district court found the newsletter relevant to determining whether Kodak made affirmative misrepresentations. Even if the newsletter's statements were true when made, that would not necessarily prevent other statements, especially later ones, from being misleading. Determining whether any single statement allegedly made by Kodak is an actionable misrepresentation requires considering the statement's meaning in context. The district court should examine all alleged statements within the total mix of information available to Plaintiffs, including the newsletter. The newsletter's statements might be relevant in determining a reasonable interpretation of ambiguous later statements, and thus whether those statements were misrepresentations.

If the court determines that Kodak made misrepresentations regarding future benefits, the availability to Plaintiffs of truthful information countering the misrepresentations will be relevant in determining if they reasonably relied on the misrepresentations. *See Sandberg*, 501 U.S. at 1097 ("While a misleading statement will not always lose its deceptive edge simply by joinder with others that are true, the true statements may discredit the other one so obviously that the risk of real deception drops to nil.") (proxy statements); *In re Unisys Corp.*, 57 F.3d at 1263-64 (company policy of "systematically" misinforming em-

ployees that medical benefits were permanent held material under ERISA despite summary plan document informing employees that benefits could change at any time). On remand, it will fall to the district court to consider the newsletter in light of the other factors that are relevant to materiality, in accordance with the framework we have outlined in this opinion.

III. CONCLUSION

For the reasons stated above, we vacate the judgment of the district court dismissing Plaintiffs' fiduciary duty claims and remand for further proceedings consistent with this opinion. Because the district court dismissed Plaintiffs' other claims on substantially the same grounds as it dismissed Plaintiffs' fiduciary duty claims, we vacate the district courts' judgment with respect to those claims as well.

Supreme Court, U.S.
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No. 96-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD MUSE, *ET AL.*,
Individually and on behalf of Others Similarly Situated
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *ET AL.*,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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APRIL 23, 1997

25 pp

QUESTIONS PRESENTED

In respondents' view, the questions that petitioners claim are presented by this case are as follows:

1. If, contrary to the conclusions of the court of appeals and the district court, "serious consideration" in this case began before all of the members of the plaintiff class left IBM, did the company, upon the commencement of "serious consideration," have an affirmative duty to disclose information about the possible new benefit plan in addition to a duty to avoid giving inaccurate responses to employee questions.

2. Did the court of appeals correctly hold that "serious consideration" does not occur before an employer begins to focus on a particular employee benefit plan for a particular purpose.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to this case are listed in the caption and in the Petition at ii. The following is an affiliate or nonwholly-owned subsidiary of respondent International Business Machines Corporation: Object Design, Inc. We have defined "affiliate" for purposes of this statement as companies in which IBM holds an interest of ten percent or greater of outstanding securities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1520

RICHARD MUSE, *ET AL.*,
Individually and on behalf of Others Similarly Situated
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *ET AL.*,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 103 F.3d 490. The district court's Opinion and Order (Pet. App. 10a-20a) and the Magistrate Judge's Proposed Findings of Fact and Recommendation (Pet. App. 22a-36a) are not reported.

JURISDICTION

The court of appeals entered its judgment on December 26, 1996. No petition for rehearing or for rehearing *en banc* was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

New or enhanced retirement, severance and other employee benefit plans typically take effect on a specified effective date. Particularly for employers with many workers, some people invariably miss out on the new or enhanced benefit by reason of having retired or otherwise terminated their employment shortly before the effective date. Sometimes such persons feel so strongly about missing out on the new benefit — even though the effective date was many months after their employment ended — that they sue under ERISA, claiming there was a fiduciary duty to forewarn them that the new or enhanced benefit was in the works, so that they could defer their retirements or resignations in order to qualify for the new benefit.

This is one such case.

The members of the petitioner class quit or retired from IBM's Lexington, Kentucky, facility on various dates from October 31, 1989, through March 31, 1990. Each of them qualified for and received a severance benefit equal to as much as one year's salary and other benefits pursuant to one of three versions of a Voluntary Transition Program (VTP) offered by the Company during this period. As a result of their departures, they could not qualify for a different severance benefit program with richer benefits (LTPP) that was announced on August 1, 1990, in connection with the sale

of a large part of the IBM business in Lexington.[1]

In some cases of this sort, like this case, the new plan was not fully developed and other alternatives were under study when the plaintiffs departed. In other cases, unlike this case, the new plan was in final form and had been endorsed by top management before the plaintiffs left. When faced with issues of this sort, virtually every circuit court has held that no fiduciary duty with respect to the new or amended benefit plan arises until that plan is under "serious consideration."[2]

The earlier cases generally characterize "serious consideration" as an issue of fact without elaborating on the

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[1] The opinions below sometimes refer to these programs as early retirement plans, but it is more accurate to characterize them as severance benefit plans. An early retirement program typically offers some enhancement to the retirement benefit to which employees would otherwise be eligible if they elect to retire by a specified date. A severance benefit program, on the other hand, need not be restricted to those who are or soon would be retirement eligible, and may be limited in other ways, such as to those working at a particular site or in a particular occupational category.

[2] *See, e.g.*, Pet. App. 6a.; *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir. 1996) ("*Fischer II*"), *cert. denied*, 137 L. Ed. 2d 329 (1997); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d, 1154, 1163-64 (6th Cir. 1988); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Hockett v. Sun Co., Inc.*, Nos. 95-5252 and 95-5255, 1997 U.S. App. LEXIS 5827, at *16 (10th Cir. Mar. 24, 1997); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991), *cert. denied.*, 502 U.S. 938 (1991); *cf. Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986) (employee who retired before new plan took effect had no standing to sue under ERISA).

meaning of that term. *See Berlin*, 858 F.2d at 1163-64; *Drennan*, 977 F.2d at 251. Some of the more recent cases, however, have attempted to add some guidance, in light of the language and objectives of ERISA, to what is otherwise a wholly conclusory term. Pet. App. 7a; *Fischer II*, 96 F.3d at 1539-40; *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1548-49 (3d Cir. 1996) ("*Kurz II*"); *Hockett*, 1997 U.S. App. LEXIS 5827, at *17-*21. In this case, the court of appeals concluded that the "serious consideration" rule "does not apply until a company focuses on a particular plan for a particular purpose." Pet. App. 7a.

In addition to resolving the events or circumstances that may trigger the beginning of a fiduciary duty with respect to an unannounced benefit plan, disputes sometimes arise in these cases over the scope of that fiduciary duty. Consistent with *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), no circuit court has suggested that deliberate attempts to defraud employees fall outside the fiduciary duty. Conversely, consistent with *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), virtually every circuit court has recognized that employer decisions regarding whether and when to adopt and how to design a benefit program are settlor not fiduciary functions, so that employers are not obligated to volunteer information about plans not yet announced. All the employer must do, if it elects to respond to employee inquiries about future benefit plans, is to do so truthfully.

Here, after extensive discovery, petitioners and respondents filed cross-motions for summary judgment. The IBM motion contended that serious consideration of the LTPP plan offered in connection with the Lexington sale did not begin before all of the plaintiffs left IBM's employment, so that none of the plaintiffs could recover. Petitioners argued not only that the court could find as a matter of law that serious consideration began as early as the fall of 1989, but

also that there was no genuine dispute that IBM gave misleading responses to employee inquiries, and failed voluntarily to disclose that the Lexington benefit plan was under serious consideration.

The Magistrate Judge, the District Judge and a unanimous three-member panel of the Sixth Circuit have now all concluded that IBM was entitled to summary judgment because the facts of the record indicated that "serious consideration" of the Lexington plan began no earlier than April 1990, and that IBM made no intentional or affirmative misrepresentations.

The facts pertinent to the serious consideration issue are as follows: In August 1989 four IBM manufacturing sites, including Lexington, obtained permission to run a voluntary transition program subsequently known as VTP-I. The program was limited to certain occupational specialties which were overstaffed. Shortly after VTP-I was announced, IBM initiated a series of staff studies in Tarrytown, New York, looking at various measures to reduce costs and improve profitability throughout the entire company. One such study group looked at the possibility of closing the Lexington site as a means of reducing excess capacity and in the course of that work developed some initial cost estimates for closure, including a severance benefit program that might be used in a closure situation. The idea of closing Lexington was fairly promptly rejected, however.

Another study group developed proposals that resulted in a nationwide VTP program announced on December 5, 1989,

known in Lexington as VTP-II.[3/]

Besides the nationwide VTP program, IBM also announced on December 5, 1989, that it would be taking a $2.3 billion write-off against 1989 earnings to cover the cost of the VTP program, as well as various write-downs of inventory and equipment and other company restructuring efforts. No decision had been made at that point precisely what restructuring would occur, although planning officials recognized that some closing or partial closing one or more facilities might be involved. To quantify the potential cost of such restructuring efforts, the staff working on the write-off used cost estimates for closing Lexington, even though closure of that facility was no longer under consideration.

A small task force was created in late 1989 at corporate headquarters in Armonk, New York to explore the possibility of selling IBM's typewriter and small printer business (known within the company as the Information Products or "IP" business) which existed to a large extent at Lexington and to a lesser extent in Boulder, Colorado, and overseas. Operating under the code name "Libra," this exploratory effort was regarded as highly confidential. Because IBM had not been operating Information Products as a separate, stand-alone business, the prospects for a sale were seen as problematic, and the Libra task force had to develop extensive pro forma financials which could be shown to prospective buyers.

Meanwhile, the managers with immediate responsibility for Lexington operations were working on their own proposals to fashion an independent business unit consisting largely of

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[3/] In January, 1990, a special leave of absence feature was added to the nationwide VTP program. This is sometimes referred to in the decisions below as a separate, third version of VTP.

the Lexington portion of the Information Products business. Their staff work included efforts to determine the optimum size of the workforce. In later months, in describing their proposals to top management and senior personnel staff representatives in Armonk, these Lexington managers on some occasions stated that they needed a very lucrative severance program to shrink Lexington's workforce, but they received no promises or assurances that such a severance program would be authorized to facilitate an internal organization.

IBM's first indication that a buyer might be interested in acquiring the Information Products business came in late March or early April, 1990. As discussions with the prospective buyer progressed, the Libra task force was expanded to include staff persons from the personnel discipline who were asked to develop appropriate personnel policies and transition programs to implement a sale, including what became the LTPP severance program. In May 1990 IBM's top management heard presentations pro and con from the advocates of a sale and from the Lexington proponents of the independent business unit approach, and decided to pursue the sale option. Subsequently the personnel group within the enlarged Libra task force, after considering and rejecting various other options, developed its proposal for what became LTPP. Top management approved that proposal in July 1990.

In affirming the District Court and the Magistrate Judge on the serious consideration issue, the court of appeals noted that, unlike the situation in earlier Sixth Circuit cases, such as *Berlin* and *Drennan*, in which the employer was considering whether to reopen an early retirement program that had been used on prior occasions, here IBM was designing a new program to deal with a unique event — the sale of much of the Lexington business. The Court observed that the risk that premature disclosure would mislead or disadvantage employees was much greater in the context of a plan being

newly formulated and that, accordingly, construing the "serious consideration" test to require premature disclosure would be inconsistent with the statutory purposes underlying ERISA's disclosure requirements, could impair the achievement of legitimate business goals by forcing the premature disclosure that a sale might occur, and would not serve the goals of encouraging employers to offer welfare benefit plans and of minimizing the burdens on employers. Pet. App. 6a-7a. Specifically, the court of appeals concluded that serious consideration does not occur until the employer "focuses on a particular plan for a particular purpose." Pet. App. 7a.

Without seeking rehearing or rehearing *en banc*, petitioners filed a timely petition for certiorari on March 25.

REASONS FOR DENYING THE WRIT

By mischaracterizing the decision below, petitioners frame questions that are not properly presented by this case. Moreover, the decision below is entirely in accord with the decisions of this Court, and does not conflict with any decision of another court of appeals. The petition for a writ of certiorari should be denied.

I. PETITIONERS' FIRST QUESTION PRESENTED IS NOT POSED BY THE COURT OF APPEALS DECISION, AND IN ANY EVENT THERE IS NO CIRCUIT CONFLICT OR OTHER SUBSTANTIAL REASON FOR THIS COURT TO REVIEW THAT QUESTION.

The first question framed by petitioners — "Does an employer/ERISA fiduciary have the affirmative duty to disclose truthful information about the serious consideration which it is giving to an enhanced severance plan?" — is not

properly presented by this case. The question assumes that IBM was giving serious consideration to LTPP prior to the time that the members of the petitioner class left the company. But the court of appeals unanimously affirmed the district court's factual finding that serious consideration occurred no earlier than April 1990, after petitioners left the company. *See* Pet. App. 6a; Pet. App. 19a. This case thus does not present the question of whether an employer has an affirmative duty to disclose its developmental work on a new employee benefit plan once that work reaches the point of serious consideration.

The court of appeals did observe that, even after serious consideration begins, an employer has no affirmative duty to disclose information about a possible new or amended plan, but merely a duty to avoid untruthful answers to employee inquiries. *See* Pet. App. 6a. But this dictum is entirely in accord with the decisions of this Court and other courts of appeals so that, even if it represented the holding of the lower court, review on *certiorari* is not appropriate.

As another recent circuit opinion put it: "ERISA contemplates that an employer often will act as both employer and plan fiduciary, and not all of an employer's business activities implicate ERISA's fiduciary duties." *Hockett*, 1997 U.S. App. LEXIS 5827, at *15 (citing *Varity*, 116 S.Ct. at 1071); *see also Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir. 1993) ("*Fischer I*"), *cert. denied*, 510 U.S. 1020 (1993).

As this Court reaffirmed just last term in *Lockheed*, 116 S.Ct. at 1789, "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans" (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995)). *Lockheed* explains that, "[w]hen employers undertake those actions, they

do not act as fiduciaries, . . . but are analogous to the settlors of a trust." 116 S. Ct. at 1789 (citing *Curtiss-Wright Corp.*, 115 S.Ct. at 1228; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994)).

Because such activities are non-fiduciary, the courts of appeals have sensibly declined to impose a duty on employers to affirmatively disclose their work on employee benefit plans before such plans are formally promulgated.[4/] As the court of appeals stated in this case:

> Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

Pet. App. 6a-7a; *see also Pocchia*, 81 F.3d at 278-79; *Fischer*

[4/] *See* Pet. App. 6a; *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), *cert. denied*, 136 L. Ed. 2d 220 (1996). ("We . . . hold that a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted."); *Drennan*, 977 F.2d at 251 (a fiduciary need not "disclose its internal deliberations"); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Sutter v. BASF Corp.*, 964 F.2d 556, 562-63 (6th Cir. 1992); *Berlin*, 858 F.2d at 1164 (employer is under no duty "to say anything at all or to communicate with potential plan participants about the future availability of [a severance plan known as] MIPP"); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995) ("Plan fiduciaries are not obligated under ERISA to provide information to potential plan beneficiaries about possible future offerings."); *Fischer I*, 994 F.2d at 135.

II, 96 F.3d at 1539; *Hockett*, 1997 U.S. App. LEXIS 5827, at *18-*21.[5/]

II. INSOFAR AS PETITIONERS' SECOND QUESTION PRESENTED IS CONCERNED, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND EITHER THIS COURT'S DECISIONS OR THE DECISIONS OF ANY OTHER COURT OF APPEALS.

In support of their second question presented, petitioners argue that the conclusion by the court of appeals that the serious consideration rule does not apply until an employer "focuses on a particular plan for a particular purpose" constitutes a "bright line" test which has been rejected by a decision of this Court in a securities case and by several courts of appeals dealing with the ERISA issue of "serious consideration." Pet. at 17-22. By omitting the words "focuses on" and frequently suggesting that the court of appeals said "adopts" a particular plan for a particular purpose, petitioners attempt to portray the court of appeals as being unduly rigid.

[5/] Petitioners claim to find support for their theory of affirmative disclosure in cases such as *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990); *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) and *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986 (7th Cir. 1993). However, those cases did not involve the particular fiduciary duty established by *Berlin* and its progeny, but rather ongoing administrative issues pertaining to published plans. Thus, in *Eddy* and *Bixler*, the employees alleged that the plan fiduciaries failed to provide complete and accurate information in response to inquiries about the employees' existing group medical coverage. In *Anweiler*, the court held that the plan fiduciary, an insurance company, improperly acted in its own interests when it asked a beneficiary to sign over his rights to the proceeds of an existing group life insurance policy.

Based on that mischaracterization of the court of appeals' decision, petitioners argue that it conflicts with *Basic, Inc. v. Levinson*, 485 U.S. 223 (1988). *Basic* concluded, in the context of the federal securities laws, that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." 485 U.S. at 236.

Clearly there is no conflict between the court of appeals and *Basic* or any other decision of this Court because neither *Basic* nor any other decision of this Court holds that the interpretation of materiality for purposes of the securities laws is to be followed in the context of claims under ERISA in which plaintiffs are seeking recovery based on allegedly misleading statements.

Moreover, here the lower court did not hold that "serious consideration" arises only when an employer "*decides* that a particular plan *will be offered* for a particular business purpose." Pet. at i (emphasis added). Rather, the court of appeals said that "[t]he exception of serious consideration does not apply until a company *focuses* on a particular plan for a particular purpose." Pet. App. 7a. (emphasis added.)

A variety of facts could show that an employer "focuses" on a particular plan for a particular purpose. Thus, contrary to petitioners' claim, the court of appeals neither adopted a "bright-line" test nor held that serious consideration can arise only after a single business decision or unique event. Rather, the court of appeals merely affirmed the district court's unremarkable factual finding that, in the context of this particular case, "it was not until IBM made a definite decision to sell the Lexington plant and was told by the buyer that further downsizing was necessary that IBM focused on this particular plan for a particular purpose." Pet. App. 7a (citing

Swinney v. General Motors Corp., 46 F.3d 512, 520 (6th Cir. 1995). Petitioners' unhappiness with that factual finding does not create a conflict with *Basic* or any other decision of this Court.

Petitioners also argue that the particular plan/particular purpose formulation conflicts with the decisions of other circuit courts.[6/] This assertion rests on the same misreading of the lower court's decision that led them to incorrectly assert a conflict between that decision and *Basic*. Two of the cases cited by petitioners as being in conflict with the decision below, *Wilson v. Southwestern Bell Telephone Co.*, 55 F.3d 399, 405 (8th Cir. 1995), and *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994), certainly identified the issues of when "serious consideration" occurs and whether misrepresentations are material as questions of fact or mixed questions of law and fact, but they certainly do not reject the notion that until "a company focuses on a particular plan for a particular purpose" alleged misrepresentations are likely to be immaterial. The only other cases petitioners cite as giving rise to a circuit conflict are cases in the Third and Tenth Circuits (*See* Pet. at 21) that have been superseded by subsequent decisions in those circuits.

Indeed, the most recent decisions of the Third and Tenth Circuits are fully consistent with the Sixth Circuit's decision in this case. In *Fischer II*, the Third Circuit concluded that:

[6/] Petitioners also argue that the decision below is in conflict with earlier Sixth Circuit decisions. Pet. at 20-21. That is an issue petitioners should have raised, if at all, in a petition for rehearing addressed to the Sixth Circuit, not a petition for *certiorari* addressed to this Court. *See Wisniewski v. United States*, 353 U.S. 901 (1957). Petitioners also claim to see a conflict with a 1993 Third Circuit decision (*Fischer I*), *see* Pet. at 21, but ignore the subsequent Third Circuit decision in *Fischer II* which is fully consistent with the Sixth Circuit's decision in this case.

> Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.

96 F.3d at 1539. The Tenth Circuit recently adopted this same three-part test and cited in support of that result the very Sixth Circuit decision petitioners now attack as being inconsistent with Tenth Circuit law. *Hockett*, 1997 U.S. App. LEXIS 5827, at *16, *19. The conclusions reached in *Fischer II*, *Hockett*, and by the court of appeals here are nearly identical in practice. Clearly, if "a specific proposal is being discussed for purposes of implementation by senior management with the authority to implement the change" within the meaning of *Fischer II*, the employer has necessarily "focuse[d] on a particular plan for a particular purpose" under the Sixth Circuit test.

III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND EITHER THIS COURT'S DECISION IN *VARITY CORP. V. HOWE* OR A RECENT SECOND CIRCUIT DECISION.

In the District Court, in their briefs to the Sixth Circuit, and even in their questions presented in this Court, Pet. at i, petitioners do not suggest that they may recover under ERISA in the absence of serious consideration. But they did call to the attention of the court of appeals this Court's decision in *Varity*, which came down after all briefs were filed below, in a letter to the Sixth Circuit prior to oral argument. In its opinion, the court of appeals, after quoting the holding of *Varity*, observed that the one bit of evidence cited by plaintiffs in support of applying *Varity* was inadequate to justify recovery under the rationale of that case. Pet. App. 8a. In

a subsequent "Supplement to Petition For Writ of Certiorari," petitioners argue vigorously that the decision below is in conflict with *Varity* and a recent Second Circuit decision in holding that there can be the liability in the absence of serious consideration. It is unclear whether petitioners are suggesting without stating a third question presented: whether the Sixth Circuit impermissibly departed from the teaching of *Varity* by holding that petitioners could not recover if they left IBM before serious consideration of LTPP began. Giving petitioners the benefit of every doubt, we will assume that they are arguing that this additional question warrants review by this Court.

In *Varity*, the employer engaged in a plan of deliberate deception designed to persuade employees to transfer to a new subsidiary which was created as a dumping ground for failing business units, and which did not have the resources necessary to pay for the benefit programs it promulgated. The employer intentionally lied to its employees, falsely assuring them, among other things, that their benefits would be safe at the new subsidiary and that the subsidiary had been provided with "the funds necessary to ensure its future viability." 116 S.Ct. at 1072. The new subsidiary went into receivership a short time later. On these facts, this Court held that "we can find no adequate basis here, in the statute or otherwise, for any special interpretation that might insulate Varity, acting as a fiduciary, from the legal consequences of the kind of conduct (intentional misrepresentation) that often creates liability even among strangers." 116 S.Ct. at 1075.

Far from being inconsistent with *Varity*, the court of appeals quoted *Varity*'s holding that:

> plan administrators who "participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the

> beneficiaries' expense" fail to act "solely in the interest of the participants and beneficiaries," and violate the duty of loyalty in Section 404(a)(1) of ERISA.

Pet. App. 8a (quoting *Varity*, 116 S.Ct. at 1074). The court of appeals then applied that holding, but found that "[t]he record does not contain sufficient evidence to establish that IBM knowingly deceived plaintiffs about the possibility of an enhanced plan."[2/] Pet. App. 8a. Thus, petitioners' claim that the court of appeals' decision is inconsistent with *Varity* has no merit.

Finally, in their supplement, petitioners assert that the court of appeals' decision conflicts with *Ballone v. Eastman Kodak Co.*, Nos. 96-7209 and 96-7212, 1997 U.S. App. LEXIS 5430 (2d Cir. Mar. 21, 1997) (Pet. Supp. App. 1a-16a). However, *Ballone* stands merely for a proposition that is uncontroversial in the wake of *Varity*: An employer "may not *actively misinform* its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes." Pet. Supp. App. 10a (emphasis added).

[2/] The court of appeals observed that petitioners' "only suggestion of any improper behavior by IBM is the June 14, 1990, memo" which petitioners have reproduced as Appendix E to the petition, but concluded that the June 14 memo showed no intentional deception by IBM. Pet. App. 8a. The June 14 memo claims that IBM employees in Boulder, Colorado — not Lexington, Kentucky — will be unhappy if LTPP is adopted because the Boulder employees were told that "VTP is as good as it's going to get;" the memo says nothing at all suggesting there was a plan intentionally to deceive Lexington employees.

Here, as in *Ballone*, the court of appeals applied *Varity* but on the different factual record the Sixth Circuit quite properly reached a different result: there is no credible evidence that IBM was following a scheme to actively misinform or deceive its employees in Lexington, or anywhere else. Pet. App. 8a. There is no conflict between *Ballone* and the Sixth Circuit opinion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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